



Digitized by the Internet Archive
in 2025

Modern American Law

*A Systematic and Comprehensive Commentary on the
Fundamental Principles of American Law*

PREPARED BY

JUDGES, MEMBERS OF THE BAR, TEACHERS IN LAW SCHOOLS,
AND WRITERS ON LEGAL SUBJECTS

UNDER THE EDITORIAL SUPERVISION OF

EUGENE ALLEN GILMORE, A.B., LL.B.

LATE DEAN, UNIVERSITY OF IOWA LAW SCHOOL

ASSISTED BY

WILLIAM CHARLES WERMUTH, M.S., LL.B.

FORMER LAW LECTURER, NORTHWESTERN UNIVERSITY



BLACKSTONE SCHOOL OF LAW, INC.
CHICAGO

Modern American Law

EQUITABLE RIGHTS AND REMEDIES

BY

JOHN NORTON POMEROY, JR., A.M., LL.B.,
FORMER PROFESSOR OF LAW, UNIVERSITY OF ILLINOIS

ATTACHMENT AND GARNISHMENT

BY

OLIVER A. HARKER, A.M., LL.D.,
FORMER DEAN, UNIVERSITY OF ILLINOIS LAW SCHOOL

JUDGMENTS AND EXECUTIONS

BY

JOHN R. ROOD, LL.B.,
FORMER PROFESSOR OF LAW, UNIVERSITY OF MICHIGAN

PARLIAMENTARY LAW

BY

JOHN H. PERRY, A.M., LL.B.,
FORMER LAW LECTURER, YALE UNIVERSITY

VOLUME 11

BLACKSTONE SCHOOL OF LAW, Inc.
CHICAGO

**COPYRIGHT, 1914, BY
BLACKSTONE INSTITUTE**

**COPYRIGHT, 1917, BY
BLACKSTONE INSTITUTE**

**COPYRIGHT, 1921, BY
BLACKSTONE INSTITUTE**

**COPYRIGHT, 1926, BY
BLACKSTONE INSTITUTE, INC.**

1962 EDITION

Printed in the United States of America

PREFACE.

The first treatise in this volume is one which has been mentioned at one time or another in other subjects. The introduction of the court of equity, its present position, and the application of its more conspicuous remedies, such as specific performance and the injunction, are probably familiar to the average reader. Here, however, the entire subject is given the full treatment. Not only is the rise of the equity court outlined but the principles of equity and the nature and scope of equitable remedies are explained.

The last but certainly not the least important step in a law suit is the judgment. Without it all of the preliminary steps are a waste of time and of no account. What a judgment is and the effects of it are explained in this volume along with the related topics of Execution, Attachment and Garnishment.

Also treated in this volume is the law and procedure of deliberative assemblies, ranging all the way from the ordinary club meeting to the highest legislative body of the state or country. The usual vague notions of rules and orders should be cleared up here through the treatise on Parliamentary Law.

TABLE OF CONTENTS

PART I.

EQUITABLE RIGHTS AND REMEDIES

INTRODUCTION.

CHAPTER I.

ORIGIN AND NATURE OF EQUITY.

SECTION	PART I—PAGE
1. Definition of equity	1
2. Why a court of chancery was needed.....	2
3. The chancellor—Origin and rise of equity jurisdiction. .	3
4. Modern consolidation of law and equity courts.....	4
5. Nature of equity	5
6. Same subject	6
7. Classification of the subject.....	7
8. Equitable remedies	8
9. Equity acts in personam.....	9
10. Same subject—Statutory changes	10

EQUITABLE REMEDIES.

CHAPTER II.

SPECIFIC PERFORMANCE OF CONTRACTS.

1. Specific performance defined	12
2. Adequacy of remedy at law.....	12
3. Same subject—Land contracts	13

SECTION	PART I—PAGE
14. Same subject—Chattel contracts—Exceptional cases..	14
15. Contracts for personal services, building contracts, etc.	15
16. Negative contracts—Injunction.....	17
17. Equitable incidents.....	19
18. Same subject—(1) Consideration.....	19
19. Same subject—(2) Misrepresentation.....	20
20. Same subject—(3) Concealment.....	20
21. Same subject—(4) Mistake.....	21
22. Same subject—(5) Hardship and unfairness.....	22
23. Same subject—(6) Mutuality.....	24
24. Same subject—(7) Doubtful title.....	26
25. Time not generally of the essence.....	27
26. How time may be made of the essence.....	28
27. Statute of Frauds—Doctrine of part performance....	29
28. Acts of part performance—Payment.....	31
29. Same subject—Possession—Improvements.....	31
30. Same subject—Continuance in possession.....	32
31. Same subject—Service:.....	33
32. Partial specific performance with compensation.....	34
33. Specific performance against third persons.....	35
34. Same subject—Equitable easements.....	36
35. Same subject—Equitable easements continued.....	37
36. Death of parties to contract.....	38
37. Vendor's lien.....	40
38. Waste or destruction of the premises.....	41
39. Summing up specific performance.....	42

CHAPTER III.

INJUNCTIONS.

40. Injunctions—Torts.....	44
41. Waste.....	44
42. Equitable waste.....	46
43. Trespass—Grounds for injunction.....	47
44. Same subject—Title in dispute—Preliminary injunction.....	49
45. Same subject—Mandatory injunction.....	50
46. Trespass to personal property.....	51

SECTION	PART I—PAGE
47. Nuisance—What nuisances are enjoined.....	51
48. Same subject—Trial at law.....	52
49. Same subject—Preliminary injunction.....	52
50. Same subject—Decree—As to balancing of injuries...	53
51. Same subject—Laches—Form of decree.....	55
52. Public nuisance.....	56
53. Infringement of patent rights.....	56
54. Same subject—Preliminary injunction.....	57
55. Same subject—Complete relief.....	57
56. Copyrights and literary property.....	58
57. Trademarks—Unfair competition.....	59
58. Other torts—Trade libels, strikes, boycotts, etc.....	60
59. Injunction against state and municipal officers.....	62
60. Injunction against taxation.....	63
61. Injunction against exercise of eminent domain power..	63
62. Injunction in aid of other equitable remedies.....	64
63. Injunctions against actions and judgments at law— Equitable defenses.....	65
64. Same subject—Judgments obtained by fraud or acci- dent	66

CHAPTER IV.

CANCELLATION—REFORMATION—RESCISSION.

65. Cancellation of instruments.....	69
66. Same subject.....	70
67. Reformation—Mutual mistake.....	71
68. Same subject—Mistake of one party, known to the other	71
69. When there can be no reformation.....	72
70. Rescission—When, for mutual mistake.....	73
71. No rescission for mutual mistake as to value.....	74
72. Unilateral mistake—Generally, no rescission or refor- mation	75
73. Unilateral mistake, known to other party, in making contract	76
74. Mistake in gifts.....	76
75. Same subject.....	77

SECTION	PART I—PAGE
76. Mistake of law.....	77
77. Same subject—Reformation where instrument does not express the contract.....	78
78. Same subject—Inequitable conduct of other party...	79
79. Same subject—Mistake as to party's existing rights..	79
80. Same subject—Compromises.....	80
81. Same subject—Mistake of law in gifts.....	81

CHAPTER V.

BILLS OF PEACE—CLOUD ON TITLE—PARTITION.

82. Bills of peace—Jurisdiction to avoid a multiplicity of suits	82
83. Same subject—Other illustrations.....	83
84. Same subject—Numerous plaintiffs.....	85
85. Same subject—Further illustrations.	85
86. Same subject—Limitation on the principle.....	86
87. Cloud on title.....	88
88. Same subject—Plaintiff's possession.....	88
89. Same subject—Instrument invalid on its face no cloud	89
90. Statutory suit to quiet title.....	91
91. Partition of land.....	91
92. Where partition is inconvenient—Owely of partition	92
93. Same subject—Partition sale.....	93
94. Partition of personal property.....	94

CHAPTER VI.

SUITS FOR PECUNIARY RELIEF.

95. Suits for pecuniary relief.....	95
96. Creditors' suits.....	95
97. Same subject—When the legal remedy is adequate...	96
98. Exoneration	97
99. Contribution	98
100. Accounting	98
101. Same subject—When the legal remedy is inadequate..	99

CHAPTER VII.

**PROVISIONAL REMEDIES—THE AUXILIARY
JURISDICTION.**

SECTION	PART I—PAGE
102. Provisional remedies.....	101
103. Interpleader	101
104. Same subject—Same thing—Debt or duty.....	102
105. Same subject—Plaintiff a mere stakeholder.....	103
106. Same subject—Privity between the claimants.....	104
107. Same subject—No independent liability to either claimant	105
108. Receivers	106
109. Same subject—When appointed.....	107
110. Same subject—Corporation receivers.....	108
111. Same subject—The receiver's possession.....	110
112. Same subject—Suits against and by the receiver....	111
113. Same subject—Receiver's management of the property	112
114. Same subject—Claims against the fund.....	112
115. The auxiliary jurisdiction—Discovery.....	114
116. Same subject—Effect of statutes upon the jurisdiction	115
117. Same subject—Suits for examination of witnesses...	115

**EQUITABLE PROPERTY RIGHTS AND
INTERESTS.**

118. Equitable estates.....	117
-----------------------------	-----

CHAPTER VIII.

TRUSTS.

119. Uses	119
120. The Statute of Uses—Trusts.....	119
121. Classes of trusts—Passive trusts.....	120
122. Express active trusts.....	121
123. Parties to trusts.....	122

SECTION	PART I—PAGE
124. Alienation and liability for debts.....	122
125. Descent and succession.....	123
126. Charitable trusts.....	123
127. What are public or charitable purposes.....	124
128. Creation of express trusts.....	125
129. Resulting and constructive trusts.....	126
130. Resulting trusts.....	127
131. Constructive trusts.....	128
132. Same subject.....	129
133. Same subject—Trusts ex maleficio.....	129
134. Duties of express trustees.....	130
135. Duty of care and diligence.....	131
136. The trustee's compensation and allowance.....	132
137. Removal and appointment of trustees.....	133
138. Quasi-trustees—Corporation directors—Stockholders' suits	133

CHAPTER IX.

OTHER EQUITABLE PROPERTY RIGHTS—ADMINISTRATION OF ESTATES.

139. Married women's separate estates.....	135
140. Her power of disposition and contract.....	136
141. The restraint upon anticipation.....	136
142. The equity to a settlement.....	137
143. Interests arising from equitable conversion.....	138
144. Reconversion	139
145. Administration of estates of decedents.....	139
146. Jurisdiction over infants.....	140
147. Jurisdiction over lunatics and idiots.....	141

CHAPTER X.

MORTGAGES.

148. Mortgages—English common law and equity theory..	143
149. American theories—Title theory states.....	144
150. Lien theory states.....	145
151. Foreclosure by sale.....	146

SECTION	PART I—PAGE
152. When deeds are treated as mortgages.....	147
153. Conveyance of the mortgaged premises.....	148
154. Assignment of the mortgage.....	149
155. No mortgage without right of redemption.....	151
156. Who may redeem from the mortgage.....	152
157. Subrogation	152
158. Same subject.....	153
159. Marshalling of securities.....	154
160. Foreclosure where land has been sold in successive parcels	155

CHAPTER XI.

EQUITABLE LIENS—ASSIGNMENTS.

61. Equitable liens.....	157
62. Equitable liens, how created.....	157
63. Vendor's lien.....	158
64. The vendor's or grantor's lien after conveyance.....	158
65. Same subject.....	159
66. Grantor's reserved lien.....	160
67. Summary—Methods of securing purchase price of land	160
68. Equitable interests arising from assignments.....	161
69. Assignment of future interests.....	161
70. Sale or mortgage of after acquired personal property	162

GENERAL PRINCIPLES AND DOCTRINES OF EQUITY.

CHAPTER XII.

DOCTRINES RELATING TO ACCIDENT, MISTAKE, AND FRAUD.

71. Accident, mistake, and fraud.....	164
72. Accident	164
73. Fraud, actual and constructive.....	166

SECTION	PART I—PAGE
174. Concealment and non-disclosure.....	167
175. Same subject—Non-disclosure by fiduciaries.....	168
176. Inadequacy of consideration.....	169
177. Persons wholly or partially incompetent.....	170
178. Expectant heirs and reversions.....	171
179. Duress and undue influence.....	172
180. Fiduciary relations—Transactions presumed invalid..	173
181. Ratification and acquiescence.....	174
182. Illegal contracts—In pari delicto rule.....	175
183. Same subject—Parties not in pari delicto.....	176

CHAPTER XIII.

ESTOPPEL—PENALTIES AND FORFEITURES— ELECTION—SATISFACTION.

184. Certain general principles of equity.....	177
185. Equitable estoppel.....	177
186. Same subject.....	178
187. Applications of equitable estoppel.....	179
188. Penalties and forfeitures.....	180
189. Penalties and liquidated damages.....	180
190. Forfeitures	182
191. The doctrine of election.....	183
192. Same subject—Donor has a partial interest.....	184
193. Same subject—Election by widow as to dower.....	185
194. The doctrine of satisfaction.....	186
195. Same subject—Legacies and advancements or por- tions	186

CHAPTER XIV.

NOTICE—BONA FIDE PURCHASE—PRIORITIES.

196. Notice	189
197. Actual notice.....	189
198. Same subject.....	191
199. Constructive notice—(1) By possession.....	192
200. Same subject—Of what the possession is notice.....	192
201. Constructive notice—(2) Notice by <i>lis pendens</i>	194

SECTION	PART I—PAGE
02. Same subject—(3) Notice by reference in the chain of title.....	195
03. Same subject—(4) Notice by recording.....	196
04. To whom the record is notice.....	198
05. Other notice in place of a record.....	199
06. Constructive notice—(5) Notice to agent is notice to principal	200
07. Bona fide purchaser—The valuable consideration....	201
08. Same subject—The payment.....	202
09. Purchaser with notice from a bona fide purchaser....	203
10. Is a quitclaim grantee a bona fide purchaser?.....	204
11. How the question of bona fide purchase may arise....	205
12. Priorities	206
13. What equities are intrinsically superior—Purchase money mortgages—Judgment liens.....	207
14. Equity inferior because of conduct of holder thereof—Effect of notice.....	208
15. Priorities on assignment of things in action, or of a trust fund.....	210

CHAPTER XV.

MAXIMS OF EQUITY AND GENERAL PRINCIPLES OF JURISDICTION.

16. The maxims.....	212
17. Equity will not suffer a wrong without a remedy....	213
18. Equity follows the law.....	214
19. He who seeks equity must do equity.....	215
20. Same subject.....	216
21. He who comes into equity must come with clean hands	217
22. Same subject.....	218
23. Equity aids the vigilant, not those who slumber on their rights—Laches.....	218
24. Same subject.....	219
25. Equity acts in personam and not in rem.....	221
26. Equity looks at the intent or substance, not at the form	222
27. Equity looks on that as done which ought to be done..	222

SECTION	PART I—PAGE
228. Equality is equity	223
229. Inadequacy of remedy at law as test of jurisdiction..	224
230. Jurisdiction, once taken, extends to the whole controversy	225
231. Jurisdiction of a subject, once existing, is not lost by the enlargement of legal jurisdiction.....	226
Bibliography	227
Quiz Questions	229-240

PART II.

ATTACHMENT AND GARNISHMENT

ATTACHMENT.

CHAPTER I.

ORIGIN AND NATURE OF THE REMEDY—GROUNDS FOR ATTACHMENT.

SECTION	PART II—PAGE
1. Definition	1
2. Origin	2
3. Subject to strict construction.....	2
4. Manner of treatment	3
5. Who may use the remedy.....	3
6. Same subject	4
7. Against whom the remedy may be used.....	4
8. Same subject	5
9. Grounds for attachment—Classification	5
10. Non-resident debtors	6
11. Absconding debtors	7
12. Fraudulent disposition of property.....	8
13. Debtor contemplating fraudulent disposition of his property	9
14. Intended removal of property from the state.....	10
15. Fraud in contracting the debt.....	10

CHAPTER II.

AFFIDAVIT—BOND—WRIT—CUSTODY OF ATTACHED PROPERTY.

1. The affidavit	13
2. Affidavit jurisdictional	13
3. Contents of the affidavit.....	14

SECTION	PART II—PAGE
19. Same subject	15
20. Bond	16
21. The obligee	17
22. Execution of the bond.....	18
23. Surety	18
24. Nature of the writ.....	19
25. Duty of the officer receiving.....	20
26. Same subject	21
27. Return of writ	21
28. Attaching officer's possession	22
29. Pursuit of the removed property.....	22
30. Preservation against loss	23
31. Sale of perishable property.....	23
32. Forthcoming bond	24
33. Dissolution bond	25

CHAPTER III.

NOTICE TO THE DEFENDANT AND PROCEEDINGS IN COURT—SALE OF PROPERTY AND DISPOSITION OF PROCEEDS.

34. Personal service	27
35. Service by publication.....	27
36. Preserving proof of service by publication.....	28
37. Effect of service by publication.....	29
38. The pleadings	31
39. The defendant not appearing	31
40. Defendant appearing and defending.....	32
41. Same subject	33
42. Third party interpleading.....	33
43. The amendments	34
44. Amendment of affidavit.....	35
45. Amendment of bond.....	36
46. Amendment of writ.....	36
47. Amendments generally	37
48. Grounds for dissolution of attachment.....	38
49. Same subject	38
50. Same subject	39

SECTION	PART II—PAGE
1. Dissolution as to others than the defendant.....	40
2. The effect of dissolving the attachment.....	41
3. Sale of attached property after judgment.....	42
4. Duty of officer as to sale.....	42

GARNISHMENT.

CHAPTER IV.

NATURE OF THE REMEDY.

5. Definition	44
6. Nature of the remedy.....	44
7. Two kinds of garnishment.....	45
8. Distinction between the two kinds.....	46
9. Persons subject to garnishment.....	46
10. Right of action by defendant against garnishee essential	47
1. Garnishee's liability for property.....	48
2. Same subject—Trust funds	49
3. Same subject—Money in the custody of the law.....	50
4. Same subject	51
5. Garnishee's liability as debtor.....	51
6. Same subject	52
7. Same subject	53
8. Same subject—Promissory notes	53
9. Same subject—Co-debtors	54

CHAPTER V.

MANNER OF ENFORCING THE REMEDY.

0. Affidavit necessary to procure process.....	56
1. Same subject	57
2. Bond	58
3. The writ	58
4. Service of the writ.....	59
5. Same subject	60

SECTION	PART II—PAGE
76. Amendments	61
77. Answer of the garnishee.....	61
78. Same subject	62
79. Same subject	63
80. Answer before a justice of the peace.....	64
81. Effect of the answer.....	64
82. Same subject	65
83. Right of defendant and others in the proceeding....	65
84. Refusing or neglecting to answer.....	66
85. Judgment against the garnishee.....	67
 Bibliography	 68
 Quiz Questions	 69-72

PART III.

JUDGMENTS AND EXECUTIONS

JUDGMENTS.

CHAPTER I.

NATURE AND ESSENTIALS.

SECTION	PART III—PAGE
1. In general	1
2. Elements of jurisdiction	3
3. Same subject—Illustrated	4
4. Nature and essentials of a court.....	6
5. Nature of the business.....	9
6. Organization and qualification of officers.....	9
7. Time of sitting	10
8. Place of sitting.....	12
9. Power to try such cases and give such judgments...	13
10. Same subject—Depends on law defining powers and not on facts	14
1. Same subject—Why so	15
2. Jurisdiction of the person.....	16
3. Same subject—Non-residents	17
4. Same subject—Exceptions	19
5. Same subject—Service on corporations.....	21
6. Jurisdiction of the thing.....	21
7. Jurisdiction of the question.....	23
8. Same subject—Opinion quoted	24
9. Same subject—Another case	26
10. That procedure is jurisdictional.....	27
1. Procedure not jurisdictional.....	29

CHAPTER II.

THE RECORD.

SECTION	PART III—PAGE
22. Nature	31
23. Entry of the record.....	31
24. Same subject—Example	32
25. Conclusiveness of the record.....	33

CHAPTER III.

EFFECT OF A JUDGMENT AS A BAR.

26. Why a bar	36
27. Amending and modifying judgments.....	36
28. Splitting the cause	37
29. Splitting the grounds of recovery and defense.....	38
30. Cross-claims	40
31. Fraud	40
32. Judgments not on the merits.....	41

CHAPTER IV.

JUDGMENTS AS ESTOPPELS.

33. Distinguished from bar	43
34. Essentials of an estoppel.....	44
35. Parties estopped	44
36. Estoppel extends only to points actually litigated...	46
37. Estoppel only as to points certainly and necessarily decided	47
38. Two actions depending on different law.....	48
39. If the court that tried the first case could not try the last one	49
40. Judgments bar and estop privies.....	51
41. Judgments binding strangers.....	52
42. Same subject—Judgments in rem.....	54

EXECUTIONS.

CHAPTER V.

NATURE AND EFFECT OF EXECUTIONS.

SECTION	PART III—PAGE
3. In general	56
4. Kinds of execution.....	56
5. Same subject—Capias	57
6. Issuing the writ	58
7. Same subject—Death	59
8. Same subject—Who may issue.....	60
9. Same subject—Form	60
10. Controlling execution of the writ.....	61
11. Who may execute the writ.....	62
12. Sheriff's right to indemnity.....	64
13. Sheriff's right to break in.....	65
14. When levy, sale, and return may be made.....	66
Bibliography	67
Quiz Questions	69-73

PART IV.

PARLIAMENTARY LAW

CHAPTER I.

INTRODUCTION.

SECTION	PART IV—PAGE
1. Preliminary statement	1
2. Organization of assemblies—Members	2
3. Officers	3
4. Control of meeting place.....	5
5. Special rules of procedure.....	5
6. Quorum	5
7. Order of business	7
8. Determinations—How arrived at	7
9. Presiding officer—Conduct and rights.....	8
10. The clerk	8
11. The journal	8
12. Members—Their rights and duties.....	9
13. Disorderly conduct	9

CHAPTER II.

THE INTRODUCTION OF BUSINESS.

14. Preliminary statement	11
15. Business, how begun	11
16. The “floor”—How obtained	12
17. Making the motion	13
18. Petitions	14
19. Ordinary business, how introduced—Seconding.....	14
20. Business—When in possession of the house.....	15
21. Questions—How put	16
22. Voting by roll call.....	17
23. When the presiding officer votes.....	18

CHAPTER III.

SUBSIDIARY MOTIONS.

SECTION	PART IV—PAGE
24. Preliminary statement	19
25. Subsidiary motions and the precedence among them..	19
26. Motion to lay on the table.....	20
27. Motion for the previous question.....	21
28. Motion to postpone indefinitely.....	22
29. Motion to postpone to a time certain.....	22
30. Motion to commit, refer, or recommit to a committee	23
31. Motion to amend—Preliminary discussion.....	23
32. Amendments, strictly so-called.....	25

CHAPTER IV.

PRIVILEGED MOTIONS.

33. Preliminary statement	27
34. Motion to adjourn	27
35. Motion to fix the time to which to adjourn.....	28
36. Motion to take a recess.....	29
37. Questions of privilege.....	29
38. Questions of privilege—How raised.....	29
39. Motion for orders of the day.....	30

CHAPTER V.

INCIDENTAL MOTIONS.

40. Preliminary statement	31
41. The question of consideration.....	31
42. Questions of order.....	31
43. Appeals	32
44. The reading of papers.....	33
45. Withdrawal of a motion.....	33
46. Suspension of a rule.....	33
47. The method of consideration.....	34
48. General remarks	34

CHAPTER VI.

SPECIAL MOTIONS.

SECTION	PART IV—PAGE
49. Reconsideration	35
50. Motions on disagreeing action.....	36

CHAPTER VII.

SUNDRY GENERAL RULES.

51. Rules enumerated	38
----------------------------	----

CHAPTER VIII.

COMMITTEES.

52. Membership	40
53. The report	40
54. Treatment of the report.....	40
55. Committee of the whole.....	41

Bibliography	43
--------------------	----

Quiz Questions	45-48
----------------------	-------

PART I

EQUITABLE RIGHTS AND REMEDIES

BY

JOHN NORTON POMEROY, JR., A.M., LL.B.*

INTRODUCTION

CHAPTER I.

ORIGIN AND NATURE OF EQUITY.

I. Definition of equity.—Equity is the system of law that was administered by the English Court of Chancery, and was adopted and is administered by courts of the same name or possessing the same functions in this country and in the English colonies. Courts of chancery were radically different from courts of common law in their procedure; the most striking difference being that cases of fact, in the former, were usually tried without a jury. The system of rules of substantive law developed by these courts was also very different. Most distinctive of this system is the great variety and efficiency of its remedies, in contrast with the three remedies of the modern common law, viz., the recovery of the possession of land or chattels or the judgment for a sum of money. Al-

Former Prof. of Law, University of Illinois Law School. Author: "Equitable Remedies." Editor: Pomeroy's "Equity Jurisprudence"; "Code of Remedies"; "Specific Performance of Contracts."

most as great a contrast was presented, until fairly recent times, by the just and enlightened character of equitable principles, compared with the harshness and arbitrariness of much of the early common law. This latter contrast has, of course, in large measure disappeared. Much of the progress in legal reform which marked the nineteenth century consisted in the adoption of equitable principles by the courts of law. It still remains true, however, that in the study of equity one constantly feels the presence of high ethical standards; whether the same statement can be made, with equal emphasis, of all branches of the common law, is a matter on which opinions may well differ.

2. **Why a court of chancery was needed.**—The legal history of English speaking countries, throughout the centuries, exhibited the curious spectacle of two distinct sets of courts, dealing largely with the same subjects, but administering systems of law utterly different in their whole character and atmosphere; one system, for centuries, having next to no influence or effect upon the other; and all this, with remarkably little confusion or clashing of authority. For the explanation of this anomalous state of things we must search in the history of English institutions in the later mediaeval and early modern centuries. Running back, then, some six centuries or more, we find the three superior law courts building up the common law, reducing it to the form of written precedents through recorded decisions. A distinguishing feature of this system was the enormous respect paid to precedent, and the unwillingness

judges to change or adapt a rule, once established precedent, to meet the needs of an advancing civilization. The system, like most early legal systems, was marked by an exaggerated formalism. Under the method of procedure by "writs," a suit's cause of action must fall within one of a limited number of settled forms or precedents, or else he would have no relief. Thus, at this period there was such thing as enforcing a contract not under seal, unless it created a certain debt. Such actions as *trespass*, *trover*, and *assumpsit* had not yet been invented.¹

3. The chancellor—Origin and rise of equity jurisdiction.—Suitors who could find no remedy in the common law courts might, as a last resort, petition the king or his privy council. At some undetermined date—certainly before the year 1300—it became common to refer such petitions to the chancellor. This was the most important officer of the crown, whose duties were very numerous. Probably at this time, at any rate at a not much later period, he exercised a certain amount of jurisdiction as an ordinary common law judge. The petitions referred to him by the crown came to be known as his extraordinary jurisdiction; such cases were to be decided on principles of honesty, equity, and conscience. Before the year 1400 the court of chancery was in full operation; though its jurisdiction and rules of decision for some time continued to be somewhat undefined. Long before the Reformation, however, we find established and in constant use

many of the rights and remedies of equity which are familiar to us to-day; such as the injunction, and uses, the precursor of what are now called trusts. The sixteenth and seventeenth centuries were great periods in its growth; a large proportion of the present doctrines of equity find their origin before the year 1700.²

4. **Modern consolidation of law and equity courts.**

—The court of chancery, as a distinct tribunal with separate judges, was abolished in England by the great reform known as the Judicature Acts of 1873. By this reform equitable and legal rights and remedies are administered in the same case; the rules of equity being given a preference where they are in conflict with rules of law. Substantially the same reform was inaugurated in this country twenty-five years earlier, in the state of New York; and within a few years spread over more than half the states. These are known as the code states, from the fact that the main principles of their procedure are embodied in a code, modelled upon that of New York. At present the systems of equity administration fall into three classes: 1. Equity administered by courts distinct from those administering the common law. 2. Equity administered according to procedure in class 1 but by same court as the law court. 3. Equity and law administered by same court without distinction in procedure. In the Federal courts, the distinction between actions and forms of actions at law and in equity were abolished in 1934, so that there is now only one form of civil action in the

² Pomeroy, *Equity Jurisprudence*, §§ 30-39.

federal courts. Thus, legal and equitable remedies may be administered in the same forum and in the same action. In all states, however, the principles and remedies of equity remain, in theory at least, undisturbed by this consolidation of courts.

5. Nature of equity.—There is more or less of a popular notion that everything in equity is vague and undefined, not susceptible of being reduced to exact rules; that an equity judge administers justice according to his individual notions of what is right, without much guidance from precedents. A great English lawyer, some three centuries ago, uttered this oft-quoted sarcasm: "Equity is a roguish thing. For law we have a measure and know what to trust to. Equity is according to the conscience of him that is chancellor: and as that is larger or narrower, so is equity. 'Tis all one as if they should make his foot the standard for the measure we call chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing in the chancellor's conscience."³ Now this description, very likely, would have been true to the facts if made a century or two earlier. Cases referred to the chancellor were, as indicated, directed to be decided according to principles of honesty, equity, and conscience. In following this general direction, the decisions of the earliest chancellors were necessarily innovations, by way of supplying defects in the common law, or correcting the harshness of some of its rules. Undoubtedly, there

was much fluctuation in the rulings of successive chancellors in the early centuries, before the Reformation; but as their decisions, in the sixteenth and seventeenth centuries, came to be more frequently reported, a body of precedents was accumulated which furnished the basis for future decisions. It is true that many leading rules in equity originated in the seventeenth and eighteenth centuries; but the same is true in many parts of the common law. Equity, to-day, is as much a system of rules and principles as is any great division of the law.

6. **Same subject.**—There is, however, an element of truth in the popular conception of equity alluded to in the last paragraph. There is some degree of vagueness about many of the principles of equity, and undoubtedly always will be, as long as the system lasts. Far from being a defect, it is a distinguishing merit of the system. The rules of the common law, being laid down in large part for the guidance of the jury, must necessarily be precise and definite. Principles of equity, on the other hand, are applied by trained judges to sets of facts which are usually much more complicated than the issues presented to a jury. An experienced equity judge may be trusted to apply an abstract principle, expressed in very general terms, which a jury would find meaningless or bewildering. Consequently, we find that many equitable remedies and defenses are said to lie “in the discretion of the court.” In exercising such discretion the judge will derive much aid from precedents, to be sure; but much more from a correct understanding of the general principle

self, as interpreted by an enlightened sense of justice. Again, equitable principles, because of this same generality or vagueness; and equitable remedies, because of their flexibility, or the power of the court to mould them to suit the circumstances of the case; are capable of indefinite expansion and growth. Equity judges, to-day, do not invent new principles; but the process of applying old principles to entirely new emergencies goes steadily on. The growth of some departments of American equity in the last thirty or forty years has been truly astonishing: the law of receivership, for example, which requires volumes for its adequate treatment, is almost entirely the work of a single generation of judges. This infinite capacity for development and growth gives to the study of equity a peculiar fascination. No other department of the law is so full of the modern spirit.

7. Classification of the subject.—Writers are not agreed as to the best classification of the mass of principles that make this subject. One method is to separate it into two divisions, the exclusive jurisdiction, and the concurrent jurisdiction. A serious objection to this method is that there is no agreement as to the sense in which these terms should be used. By one definition, if the same set of facts give rise to two remedies, one at law and one in equity, the equitable remedy belongs to the concurrent jurisdiction. Thus, since fraud often gives rise to a remedy at law for damages, or to rescission of the fraudulent transaction and cancellation (i. e., destruction) of the instrument in which it is embodied as the equita-

ble remedy, cancellation would belong to the concurrent jurisdiction. A better definition of the concurrent jurisdiction compares the character of the two remedies—the legal and equitable—arising from the same facts, and if there is a general similarity in their nature, classes the equitable remedy in the concurrent jurisdiction. Thus, the remedy of replevin lies at law for the recovery of a chattel wrongfully detained from the owner; equity also sometimes (though rarely) under the same circumstances, enforces the delivery of a chattel.⁴ Under this definition of the concurrent jurisdiction, however, the remedies comprised within it are comparatively few.⁵ A more convenient division, for the purposes of this article, is that into equitable remedies; equitable property rights, or quasi-property rights;⁶ and the general principles, doctrines, and maxims which run through the whole system. This classification has the advantage, for the reader, of starting with the concrete, and working gradually toward the abstract.

8. Equitable remedies.—Legal remedies are, practically, only two in number: the recovery of possession of land (ejectment) or chattels (replevin), and the recovery of a sum of money as an ascertained debt or as damages. The remedies of equity in common, every day use, on the other hand, number at least two dozen; and in theory this number is without limit. The power is asserted and is constantly exercised to mould or adjust its ordinary remedies to suit the circumstances of the individual

⁴ See § 14.

⁵ See an enumeration in Pomeroy, *Equity Jurisprudence* (3d ed.), §§ 173-189.

⁶ See § 118.

case. This result naturally flows from the freedom and flexibility of the rules of equity procedure relating to parties and judgments, as compared with the common law rules. By the equity practice, all parties who are interested in the subject matter of the suit, so that their rights may be affected by the decree, are made parties, either as plaintiffs or defendants, and the relief given to each party is adjusted to his rights.

9. **Equity acts in personam.**—Perhaps the most distinctive feature of equitable remedies is that they usually act in personam—against the person. This does not mean, at all, that equity deals chiefly with personal rights and duties; on the contrary, its jurisdiction is concerned almost exclusively with rights of property. The meaning is, that the order or decree of the court is addressed to the party, directing him to do some specified act; his disobedience will be treated as a contempt of court, and punished by fine or imprisonment. Thus, if the suit results in the establishment of A's right in equity to a conveyance of certain land from B, the latter is ordered to make a deed in proper form, sufficient to convey the land to A. The decree did not operate of its own force to vest the legal title in A.⁷ Courts of equity, in their early history, were hardly in a position to dictate to courts of law what the latter should recognize as constituting a legal title. They accomplished the desired result by compulsion upon the person of the defendant, ordering him to make such title as the

⁷ Hart v. Sansom, 110 U. S. 151, 3 Sup. Ct. 586, 1 Ames, Equity Jurisdiction Cases, p. 11.

courts of law would recognize. Again, suppose that B has obtained a judgment at law against A by methods which a court of equity deems unconscientious or fraudulent. Chancery did not assume to reverse this judgment; it did, however, by its decree, order B to take no steps to realize the benefit of his judgment.⁸

One important result of this personal element in the equity decree is that the court may order a party to do an act which will take effect in a foreign state or country. Thus, suppose that B is under some equitable duty to convey certain land in Indiana, or in Canada, to A. If a court of equity in Illinois has jurisdiction over the person of B, A may obtain a decree in Illinois directing B to execute a deed, in proper form, of the land in Indiana or Canada; and B's deed, so executed, will be recognized by the foreign court as fully as if it were B's voluntary act.⁹

10. **Same subject—Statutory changes.**—The rule that equity acts only in personam was subject to some inconveniences. An obstinate defendant had it in his power to set the decree at defiance, if he preferred to stand the consequences of his contempt; while an insane or incompetent defendant could not make a valid conveyance, whether under compulsion or not. For these and other reasons, statutes have been passed in all the states, enabling many decrees

⁸ See § 64.

⁹ Penn v. Lord Baltimore, 1 Ves. Jr. 444 (Eng.), 1 Keener, Equity Jurisdiction Cases, p. 12, 1 Scott, Cases on Equity, p. 236; Gardner v. Ogden, 22 N. Y. 327, 78 Am. Dec. 192, 1 Ames, Equity Jurisdiction Cases, p. 6, **LEADING ILLUSTRATIVE CASES.**

to be carried out without the coöperation of the persons against whom they are made. If the purpose of the decree is to vest B's title in A, some court officer is empowered by the statute to execute the proper instrument, which will then have the same effect as if it had been made by B: or, by some statutes, the decree itself is given the force of a conveyance by B to A. An important result of these statutes is, that a court of equity is often able to settle the title to land within its territorial jurisdiction although B, the party who would otherwise have to execute a deed, is not personally before the court and cannot be reached by its process.¹⁰ In perhaps a majority of cases, however, the decree of a court of equity is necessarily in personam: as in injunction, the commonest of equitable remedies.

¹⁰ *Dillon v. Heller*, 39 Kan. 599, 18 Pac. 693, 1 Ames, Equity Jurisdiction Cases, p. 14, 1 Scott, Cases on Equity, p. 246, LEADING ILLUSTRATIVE CASES; *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557.

EQUITABLE REMEDIES

CHAPTER II.

SPECIFIC PERFORMANCE OF CONTRACTS.

11. **Specific performance defined.**—Specific performance of contracts is the remedy by which the parties to a contract are compelled to do the very acts which the contract calls for.¹¹ By means of its machinery for enforcing its decrees—imprisonment and the like¹²—the court of equity has the power, in many instances, to compel the literal performance of the terms of a contract, while a court of law, as a general thing, can only award damages for breach of the contract.

It happens that this remedy of specific performance illustrates admirably a great many of the general principles and doctrines peculiar to equity; it furnishes, therefore, an excellent introduction to the study of the subject—a sort of cross-section.

12. **Adequacy of remedy at law.**—Courts of equity came into existence not to displace the work of the law courts but to supplement its defects. It is a fundamental principle of equity jurisdiction,

¹¹ For example, if defendant has contracted to convey a certain piece of land, the court orders him to execute a deed in proper form sufficient to convey the land.

¹² See § 9.

therefore, that a court of equity will not, as a general thing, employ its peculiar remedies when the *remedy at law is full, complete, and adequate*: that is, where the suitor can obtain as complete justice, for all practical purposes, from the law courts as from the court of equity. This principle greatly narrows the scope of the jurisdiction as respects specific performance.

Take a contract for the sale of an ordinary chattel, say 100 bushels of wheat, at \$1 a bushel. When the time comes for delivery of the wheat, the market price of wheat is \$1.20 a bushel, and the seller refuses to carry out the contract. The damages which a court of law awards are measured by the difference between the contract price and the present market value. Adding these damages—\$20—to the sum which he had set aside for his purchase—\$100—the buyer can easily obtain in the market wheat of exactly the same grade and quality as that which he bargained for. Equity could do no better for him if it should order the seller to deliver to him 100 bushels. The legal remedy, therefore, is adequate. We may generalize from this example and lay down the rule that equity will *not* grant specific performance of most *contracts relating to ordinary chattels*, since the legal remedy of damages is adequate.

13. **Same subject—Land contracts.**—Does this same course of reasoning apply to a contract for the purchase and sale of land? Plainly, it does not, as an ordinary thing. A man bargains to buy a particular piece of land because there is something about its location or quality that suits his purposes. If the

seller fails to live up to his contract, damages will not, as a general rule, enable the purchaser to buy another tract of land which is the exact equivalent of that which he bargained for. So true is this, as a matter of general experience, that courts of equity ignore the exceptional cases, and assume that damages are *always* an inadequate remedy for the breach of a land contract. The hard and fast rule is laid down, therefore, that specific performance *may always be had of a contract for the sale of land*, provided the contract and the conduct of the parties live up to certain equitable standards which are described later. The fact that with damages the disappointed buyer could purchase a lot next to the one contracted for, substantially similar to it in all respects, is no defense; equity will give him the exact subject of his bargain.¹³

14. Same subject—Chattel contracts—Exceptional cases.—The cases, however, are fairly numerous where damages do not enable the purchaser to obtain the substantial equivalent of the article which he contracted to buy. Thus, suppose the subject matter of his contract to purchase consists of shares of stock in a “close” corporation—one whose stock is seldom for sale in the stock market. The purpose of his contract—to become a member of the corpora-

¹³ This explanation of the distinction between land and chattels as respects the remedy of specific performance is the one generally given. Perhaps it is better to attempt no explanation of the hard and fast rule relating to land contracts, but to refer simply to the historical fact that courts of equity had been enforcing land contracts as a matter of course for some centuries before they were asked to enforce chattel contracts. The explanation was an afterthought, to account for the courts' refusal to take jurisdiction over chattel contracts.

tion—will not be accomplished by giving him a sum of money in place of the stock. It is generally agreed, therefore, that contracts for the purchase and sale of stock of this character will be specifically enforced.¹⁴ Again, the article may be of such a peculiar value to the individual plaintiff that no damages which a jury would be likely to assess will compensate him for its loss. It may have a sentimental value to him—*pretium affectionis* (the price of affection). This was well illustrated by cases in the southern states, before the Civil War, relating to household slaves; these were deemed to have a special value to the master resulting from their personal traits over and above their market value as laborers or human chattels, and thus were a frequent subject for the exercise of equity jurisdiction. These are mere illustrations drawn from a wide range of contracts where the legal remedy for breach of the contract is inadequate.

15. Contracts for personal services, building contracts, etc.—The last illustration may suggest the question: Why are not contracts for personal services generally, or frequently, specifically enforced? At least two important reasons come into play here, which prevent the direct enforcement of such contracts by means of a decree ordering the party to do the act contracted for. In the first place, strong motives of public policy forbid; compulsory service is apt to be inefficient and unsatisfactory.¹⁵ Sec-

¹⁴ *New England Trust Co. v. Abbott*, 162 Mass. 148, 154, 38 N. E. 432, 7 L. R. A. 271, H. & B. 720. See, also, *Equitable Gas Light Co. v. Baltimore Coal Tar, etc., Co.*, 63 Md. 285, LEADING ILLUSTRATIVE CASES.

¹⁵ *De Rivafrinolli v. Corsetti*, 4 Paige 264 (N. Y.), 25 Am. Dec. 532.

only, a contract involving a great many details—such as a contract to build a house, or calling for a great many acts running over a long period of time—such as a contract to operate a railroad—would present a case unduly taxing the time and attention of the court that should attempt to make a decree specifically enforcing the contract. Suppose the defendant against whom such a decree is made should attempt to shirk the work which he is ordered by the court to do; questions would constantly be coming up for the court's decision, whether the defendant had yielded sufficient obedience to the decree or whether he had disobeyed and thus merited punishment for contempt.¹⁶

Contracts for personal service, for building or construction, and for continuous acts, are, therefore, seldom specifically enforced. Here, however, there are a few exceptional cases, where the court will struggle with the inconvenience of enforcing its decree in order to prevent gross injustice. Suppose a railroad buys a right of way across plaintiff's farm and as a part of the consideration agrees to build a farm crossing through its embankment; and without this crossing the plaintiff will have to take a long roundabout course to reach his fields from his house and barn. The land was acquired from the plaintiff as part of the contract sought to be enforced; the construction called for is on the defend-

¹⁶ Beck v. Allison, 56 N. Y. 366, 15 Am. Rep. 430, 1 Ames, Equity Jurisdiction Cases, p. 70, 2 Keener, Equity Jurisdiction Cases, p. 167, LEADING ILLUSTRATIVE CASES; 2 Scott, Cases on Equity, p. 79; Keith, Prowse & Co. v. National Telephone Co., (1894) 2 Ch. 147 (Eng.), 2 Keener, Equity Jurisdiction Cases, p. 188.

plaintiff's land, not on the plaintiff's; and the inconvenience to the plaintiff resulting from the breach of the contract is of a nature very difficult to estimate in damages. The construction work, moreover, is simple; it will not be difficult for the court to determine whether its decree is complied with. In situations of which this is a type, therefore, specific performance has often been decreed of building contracts, or of contracts calling for continuous acts.¹⁷

16. **Negative contracts—Injunction.**—Contracts for personal services sometimes contain a stipulation that so long as the contract lasts the party will not render services to another person. Thus, Smith, an actor, agrees to perform for Jones, a manager, during the theatrical season, and not to perform for any other person. Smith now breaks his contract and begins to perform for Brown, a rival manager. As we have just seen, the court will not make a decree ordering Smith to act; but, may the court lay hold of the negative stipulation, and by *injunction* order Smith *not* to act for Brown or anyone else except Jones? Such a decree would be open to no objection on the ground of difficulty of enforcement. It would tend to accomplish indirectly what cannot be accomplished directly; for Smith, being debarred by the decree of a means of livelihood other than that provided by his contract, would probably resume the performance of his contract with Jones. After some wavering the English courts, about sixty years ago, in a leading case, issued an injunction on this state

¹⁷ *Storer v. Great Western Ry. Co.*, 2 Younge & C. C. C. 48 (Eng.), 2 Keener, Equity Jurisdiction Cases, p. 141.

of facts;¹⁸ and this example has been generally followed in this country. The American courts of equity, however, adhering to the general principle, refuse relief where the legal remedy is adequate, which phrase, in this connection, means where the services are of such an ordinary character that a substitute for Smith can readily be found. Injunction issues only where the services are unique or extraordinary, such as those of a theatrical "star."¹⁹ These cases, consequently, present the curious feature that the attorney for the defense seeks to persuade the court that his client is a person of no reputation, ability, or importance!

Injunction against breach of negative contracts is not confined to service contracts, such as those just mentioned. A common type of negative contract is the covenant made by a man selling out his business or his professional practice not to engage in the business or profession within a certain area. The damages which will result from a breach of such a covenant, consisting in the loss of business which the covenantee will suffer from the prohibited competition, are, obviously, a very hard thing to estimate. Equity, therefore, freely enjoins the breach of such a covenant;²⁰ unless, indeed, the contract is so

¹⁸ *Lumley v. Wagner*, 1 De Gex, M. & G. 604 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 93, 2 Scott, Cases on Equity, p. 96, 2 Keener, Equity Jurisdiction Cases, p. 223, H. & B. 614.

¹⁹ *Rogers Mfg. Co. v. Rogers*, 58 Conn. 356, 20 Atl. 467, 18 Am. St. Rep. 278, 7 L. R. A. 779, 2 Keener, Equity Jurisdiction Cases, p. 295, H. & B. 614.

²⁰ *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419, 1 Ames, Equity Jurisdiction Cases, p. 123; *McClurg's Appeal*, 58 Pa. St. 51, H. & B. 751; *Wilkinson v. Colley*, 164 Pa. St. 35, 30 Atl. 286, 26 L. R. A. 114, 2 Keener, Equity Jurisdiction Cases, p. 300.

framed that it is an unreasonable restraint of trade and therefore void both in law and equity.

17. **Equitable incidents.**—Granting that the contract is one of which equity takes jurisdiction—that it concerns land, or that the legal remedy is inadequate—it must live up to certain requirements which a court of equity exacts. It is often said that the remedy of specific performance is “discretionary.” When this phrase is carefully examined it is usually found to mean that equity, in some respects, sets higher ethical standards than a court of law, and demands that the contract or the conduct of the parties comply with these standards.²¹

18. **Same subject—(1) Consideration.**—A contract in equity as in law must be for a valuable consideration. But a promise made for no consideration, but *under seal*, though binding at law, will not be specifically enforced. The seal does not, in equity, take the place of an actual consideration. It is one of the maxims of equity, well illustrated by this rule as to the seal, that “Equity looks at the substance, not at the form.”²²

While a consideration is imperative, the amount of consideration is, of itself, unimportant. The mere fact that land which A agrees to sell for \$100, is really worth \$1,000—that the consideration is inadequate—is no defense.²³ But this fact, taken in con-

²¹ See § 6.

²² *Jefferys v. Jefferys*, Cr. & Ph. 138 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 261, 1 Scott, Cases on Equity, p. 303, 2 Keener, Equity Jurisdiction Cases, p. 760.

²³ *Burrowes v. Lock*, 10 Ves. 470 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 263; *Seymour v. Delancy*, 3 Cow. 445 (N. Y.), 15 Am. Dec. 270, 2 Keener, Equity Jurisdiction Cases, p. 772.

nection with other facts, may be strong evidence that A was defrauded or imposed upon, so that on these latter grounds the contract is unfit for enforcement.

19. Same subject—(2) Misrepresentation.—The plaintiff in a suit for specific performance must have been guilty of no misrepresentations acting as an inducement to the contract. Moreover, such misrepresentations will be a defense though they were made in entire innocence, though the maker of them fully and honestly believed that the statements were true and had good reason for his belief.²⁴ In this respect the character of the representation which will defeat a contract in equity is entirely different from the willful falsehood which gives rise to an action at law for the tort, deceit.

20. Same subject—(3) Concealment.—The American cases appear to agree that the vendee who knows of facts of which the vendor is ignorant—such as the existence of a valuable mine on land which is sold as farm land—greatly enhancing the value of the land, must disclose these facts to the vendor; otherwise, he will lose his right to the remedy of specific performance, though his legal right to damages still remains.²⁵ This holding illustrates in the plainest manner the “discretionary” nature of this particular remedy; and in establishing this high ethical standard for their suitors, the American courts of equity have gone far in advance of the

²⁴ Wall v. Stubbs, 1 Madd. 80 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 362, 2 Scott, Cases on Equity, p. 239; Holmes's Appeal, 77 Pa. St. 50.

²⁵ Byars v. Stubbs, 85 Ala. 256, 4 South. 755, 1 Ames, Equity Jurisdiction Cases, p. 370; Wollums v. Horsley, 93 Ky. 582, 20 S. W. 781, 2 Keener, Equity Jurisdiction Cases, p. 926, 2 Scott, Cases on Equity, p. 251.

modern English courts,²⁶ a fact which it is well for Americans at the present day to weigh and ponder. It still remains true, however, that the mere failure, without other intervening circumstances, to disclose such secret information is not a ground for setting aside a contract or a deed executed in consummation hereof.²⁷

21. **Same subject—(4) Mistake.**—As will be shown in a subsequent chapter,²⁸ “mutual” mistake, that is, a mistake as to the same thing, shared in by both parties to the contract, is often a good reason in equity for setting the contract aside. When the mutual mistake is of such a character it may, of course, be set up in equity as a defense to the enforcement of the contract. Unilateral mistake, however—a mistake on one side, the other party believing that the contract is what it appears to be—does not invalidate the contract either in law or in equity.²⁹ Here, again, in granting the discretionary remedy of specific performance, the court sometimes permits a mistake on the defendant’s side alone to be set up as a defense. Thus, when there was an ambiguity in the plan or description of the property, though not amounting to a misrepresentation, leading the defendant vendee to suppose that he was getting something different from the thing actually

²⁶ *Turner v. Green*, (1895) 2 Ch. 205 (Eng.), 1 Ames, *Equity Jurisdiction Cases*, p. 364.

²⁷ See § 174.

²⁸ See § 70.

²⁹ See § 72; *Tamplin v. James*, L. R. 15 Ch. Div. 215 (Eng.), 1 Ames, *Equity Jurisdiction Cases*, p. 388, 2 Keener, *Equity Jurisdiction Cases*, p. 9, 2 Scott, *Cases on Equity*, p. 277; *Western R. R. v. Babcock*, 6 Met. 6 (Mass.), 2 Keener, *Equity Jurisdiction Cases*, p. 937.

sold;³⁰ or where plaintiff, in accepting defendant's disadvantageous offer, must have known that defendant committed some serious error in calculation;³¹ or even in a case where defendant, bidding hurriedly at an auction, without attending to the description of the land, unwittingly purchased an entirely different lot from that which he supposed he was buying,³² specific performance has been refused on account of the one-sided mistake.

22. Same subject—(5) Hardship and unfairness.—If, under the circumstances of the case, the remedy of specific performance would be unduly harsh or oppressive in its effects upon the defendant or upon third persons; or if the contract itself is an unconscientious one or obtained by unfair means, the court often declines to enforce specific performance, and leaves the plaintiff to his remedy at law. In applying these defenses—harshness and unfairness—the court exercises a true discretion, and refuses to be bound down to precise rules; precedents are of little value, the court preferring to apply its standards of justice to each case on its special facts.

The cases, however, admit of classification to a limited extent. In a leading case, a contract was made before the Civil War; by force of acts of Congress, the price was payable in currency, which was

³⁰ *Denny v. Hancock*, L. R. 6 Ch. App. 1 (Eng.), 2 Keener, Equity Jurisdiction Cases, p. 969; *Swaisland v. Dearsley*, 29 Beav. 430 (Eng.), 1 Ames, Equity Jurisdiction cases, p. 376.

³¹ *Webster v. Cecil*, 30 Beav. 62 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 382, 2 Keener, Equity Jurisdiction Cases, p. 954, 2 Scott, Cases on Equity, p. 279.

³² *Malins v. Freeman*, 2 Keen 25 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 383, 2 Keener, Equity Jurisdiction Cases, p. 933, 2 Scott, Cases on Equity, p. 272.

greatly depreciated in value; the court, therefore, refused the equitable remedy, unless the plaintiff could consent to pay in gold. Here was an event, utterly unforeseen by the parties when they made the contract, which rendered its enforcement ruinous to one of the parties.³³ If, however, the change in circumstances which renders enforcement a hardship to defendant is one which he should have foreseen, it presents no defense—as where the contract was for the purchase of land, of which he intended to make a particular use, depending on the consent of a third person, and that consent was refused. That a party has speculated and lost is no defense to the enforcement of his bargain in equity or in law.³⁴ Specific performance, also, has often been refused where it would be of little benefit to plaintiff and a great detriment to defendant or to third parties—as in the case of covenants restricting the use of land;³⁵ or in the cases relating to the operation of railroads,³⁶ if enforcement would hamper the company in its paramount duty of safe and convenient service to the public.³⁷

³³ Willard v. Tayloe, 8 Wall. 557 (U. S.), 19 L. Ed. 501, 1 Ames, Equity Jurisdiction Cases, p. 404, H. & B. 644, 2 Keener, Equity Jurisdiction Cases, p. 1006, 2 Scott, Cases on Equity, p. 33, LEADING ILLUSTRATIVE CASES. See also Gotthelf v. Stranahan, 138 N. Y. 345, 34 N. E. 286, 20 L. R. A. 455, 100 L. Ed. 100, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

³⁴ Adams v. Weare, 1 Bro. C. C. 567 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 397, 2 Keener, Equity Jurisdiction Cases, p. 1006, 2 Scott, Cases on Equity, p. 286; Franklin Tel. Co. v. Harrison, 145 U. S. 459, 12 Sup. Ct. 100, 36 L. Ed. 776, 2 Keener, Equity Jurisdiction Cases, p. 1055.

³⁵ See § 35.

³⁶ See § 15.

³⁷ Conger v. N. Y. W. S. & B. R. Co., 120 N. Y. 29, 23 N. E. 983, 1 Ames, Equity Jurisdiction Cases, p. 412, H. & B. 723, 2 Keener, Equity Jurisdiction Cases, p. 1046, 2 Scott, Cases on Equity, p. 304.

What shall constitute such unfairness, in the contract itself or the means by which it is procured, as will require the court to decline specific performance, is a question that baffles definition. Mere inadequacy of price, between parties dealing at arms' length and upon equal terms, is not a sufficient defense, as indicated;³⁸ but the court of equity will readily seize upon any additional inequitable feature, any imposition or sharp practice, inequality of the parties, or even inadvertence resulting in a disastrous bargain, as a sufficient reason for refusing its aid in enforcing the contract.³⁹

23. Same subject—(6) Mutuality.—Go back for a moment to the contract for personal services. A agrees to deed to B a lot of land; B agrees to pay for it, after conveyance, by painting A's house. A now repents of his bargain, and B sues for specific performance, offering to perform his side of the bargain, viz., do the painting. Should B succeed? It is settled that he cannot. The court cannot compel B to do the painting; and as it cannot give to both parties the remedy in equity, it prefers to give the remedy to neither.⁴⁰ When the case comes up for a decree, there must be a *mutuality of equitable remedies*. This simple matter has been and contin-

³⁸ See § 18.

³⁹ See *Friend v. Lamb*, 155 Pa. St. 529, 25 Atl. 577, 34 Am. St. Rep. 672, 1 Ames, Equity Jurisdiction Cases, p. 408, 2 Keener, Equity Jurisdiction Cases, p. 1066, 2 Scott, Cases on Equity, p. 306; *Kelley v. York Cliffs Improvement Co.*, 94 Me. 374, 47 Atl. 898, 1 Ames, Equity Jurisdiction Cases, p. 402.

⁴⁰ *Wakeham v. Barker*, 82 Cal. 46, 22 Pac. 1131, 1 Ames, Equity Jurisdiction Cases, p. 87; *Stocker v. Wedderburn*, 3 Kay & J. 393 (Eng.), 2 Keener, Equity Jurisdiction Cases, p. 801.

is to be a curious source of misstatement in judicial opinions and in text-books. It has been stated, dicta innumerable, that the contract *from the time it is made*, must be "mutual in obligation and remedy." But when the cases are examined in which the courts have had the opportunity to apply this broad statement of the rule, the decisions almost uniformly contradict it. Thus, where of the two parties to the contract, A and B, A only has signed the memorandum required by the Statute of Frauds, that at law B may sue A, but A may not sue B, has been urged that equity, on the principle of mutuality, should withhold relief from both; but this plea has been steadily denied by the courts.⁴¹ The plaintiff, can be compelled by the court to do his part in order to obtain the remedy; it is immaterial that A could not have brought an independent suit against B. Or, take the case at the beginning of this paragraph. If B has already done the services, he may successfully sue in equity, in spite of the fact that before such performance by B a suit by A against B in equity would not have lain.⁴² Or, take the case of an option to purchase. A, for a consideration (say \$10), gives B an option to buy certain land within three months for a certain price. B notifies A within the three months of his intention to buy, offers the price, and A refuses. With a pertinacity truly remarkable, lawyers, relying on the

⁴¹ *Hatton v. Gray*, 2 Ch. Cas. 164 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 421, 2 Scott, Cases on Equity, p. 129 (Eng.); *Forthman v. Deters*, 6 Ill. 159, 99 Am. St. Rep. 145, 69 N. E. 97.

⁴² *Howe v. Watson*, 179 Mass. 30, 60 N. E. 415, 1 Ames, Equity Jurisdiction Cases, p. 429.

“mutuality” dicta, have insisted that, as there was nothing on which A could sue B before the latter “took up” his option, the courts should not now give the remedy in equity to B; but with equal resolution the courts have turned this argument down.⁴³ The “mutuality” muddle, in fact, boils down, on close examination, to the simple rule stated at the beginning of this paragraph.

24. **Same subject—(7) Doubtful title.**—Suppose Smith, a vendor, is suing for specific performance of his contract to convey a fee simple to Jones. Smith, of course, in order to succeed, must be able to convey what he contracted to convey, viz., the fee simple; if he owns only a life estate he must fail. Now, suppose that Smith derived his title under the will of Brown, and the language of the will was so ambiguous as to leave it doubtful whether Smith took a fee simple or a life estate under the will. Grant that the court, before which the specific performance suit is pending, is of the opinion that the will gave Smith a fee simple; must it compel Jones to accept Smith’s title? The decree of the court will be binding only on the parties to the suit; it will still be open to the heirs of Brown or other persons interested under Brown’s will to claim that Smith received by the will, and therefore could convey to Jones a life estate merely. Jones will thus be compelled by the court to buy a lawsuit instead of the flawless title that his contract called for. The opinion of the court in favor of the title will not cure its

⁴³ McCormick v. Stephany, 57 N. J. Eq. 257, 41 Atl. 840, 1 Ames. Equity Jurisdiction Cases, p. 431.

fects. The court, therefore, should not, at suit of the vendor, compel the vendee to accept a doubtful title, a title which other courts may consider invalid; even though the court itself may be of the opinion that his title is good.⁴⁴ The vendor should first establish his title by a suit against the adverse claimants and not cast this burden on his vendee.

25. Time not generally of the essence.—Must a party to a contract who fails to perform his part on the stipulated date lose all his rights in equity under the contract? A agrees to pay the purchase price and receive his deed on March 1st, but is not ready with his money until April 1st; or, A is ready with his money at the appointed time, but B, the vendor, is not prepared to transfer a perfect title until a month later. Does the party in default forfeit his right to the aid of equity? The answer is, "Time is not of the essence of the contract" in equity; that is to say, the provision as to the time of performance is not an essential term of the contract. Equity abhors forfeitures; and considers that whatever loss is suffered by the delay may be readily compensated in damages; e. g., if the vendee was the party in default, he may be compelled to pay interest on the purchase money as a condition of relief.⁴⁵ It must not be inferred, however, that a party may wait indefinitely and still be entitled to the aid

⁴⁴ *Pyrke v. Waddingham*, 10 Hare 1 (Eng.), 1 Ames, Equity Jurisdiction, p. 269, 2 Scott, Cases on Equity, p. 361; *Heedley v. Johnson*, 42 Conn. 443, 18 Am. St. Rep. 521.

⁴⁵ *Parkin v. Thorold*, 16 Beav. 59 (Eng.), 1 Ames, Equity Jurisdiction, p. 327; *Seton v. Slade*, 7 Ves. 265, 271 (Eng.), 2 Scott, Cases on Equity, p. 332.

of equity. If he has waited several years, and especially if his delay has prejudiced the other party, he may be held guilty of *laches*.⁴⁶ In determining what constitutes *laches* the court is guided by no fixed standard like the Statute of Limitations; each case depends on its own circumstances.

26. How time may be made of the essence.—The rule that time is not of the essence is not pushed to such a length as to defeat the intention of the parties. 1. Time may be made of the essence by an express stipulation of the parties to that effect; the party in default will then be debarred of his remedy in equity.⁴⁷ 2. The nature of the contract, or of the subject matter, may indicate that time is essential. It is essential, for example, if the thing is of such a nature that it fluctuates rapidly in value, as mining stock.⁴⁸ An option contract must be complied with within the time limited; if A gives B an option to purchase provided B notifies A within three months of his intention to purchase, notice given by B after the expiration of the three months will not avail.⁴⁹ 3. Circumstances may show that the parties intended the contract to be complied with at the specified time, or not at all. Thus, if A agrees to sell a house to B, and make title on January 1st, knowing that

⁴⁶ *Hubbell v. Von Schoening*, 49 N. Y. 326, 2 Scott, Cases on Equity, p. 350, 2 Keener, Equity Jurisdiction Cases, p. 1105; *Combs v. Scott*, 76 Wis. 662, 45 N. W. 532, H. & B. 682, 2 Scott, Cases on Equity, p. 357, 2 Keener, Equity Jurisdiction Cases, p. 1194.

⁴⁷ *Seton v. Slade*, 7 Ves. Jr. 265, 271, 273 (Eng.), 2 Scott, Cases on Equity, p. 332; *Sowles v. Hall*, 62 Vt. 247, 22 Am. St. Rep. 101, 20 Atl. 810, 2 Keener, Equity Jurisdiction Cases, p. 1117.

⁴⁸ See *Taylor v. Longworth*, 14 Pet. 172 (U. S.), 10 L. Ed. 405.

⁴⁹ *Lord Ranelagh v. Melton*, 2 Drew & S. 278 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 319.

s lease of his present residence expires on that date, and that B will then require the house for immediate occupancy, A's inability to make out a good title on January 1st is not cured by his ability to do so a month later; circumstances have made time of the essence.⁵⁰ 4. Even where time was not originally an essential feature of the contract it may be made essential by means of notice served upon the party in default. If the seller is tired of waiting for his price, he may serve notice upon the purchaser, specifying a reasonable time in which the price must be paid; if the purchaser delays beyond this period so specified, he loses his rights as completely as if time had originally been made essential.⁵¹ In these days courts of equity guard against the abuse of their general principle that time is not of the essence.

27. Statute of Frauds—Doctrine of part performance.—One of the most important and far-reaching principles of equity is that the statute designed for the purpose of suppressing frauds and perjuries shall not itself be made the instrument of committing a fraud.⁵² This principle is at the basis of the remarkable doctrine of part performance of parol contracts—one of the commonest doctrines with which American courts of equity have to deal. This doctrine is that oral land contracts may be specific-

⁵⁰ *Tilley v. Thomas*, L. R. 3 Ch. 61 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 336, 2 Scott, Cases on Equity, p. 345, 2 Keener, Equity Jurisdiction Cases, p. 1091.

⁵¹ *Parkin v. Thorold*, 16 Beav. 59 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 327; *Webb v. Hughes*, L. R. 10 Eq. Cas. 281, 2 Keener, Equity Jurisdiction Cases, p. 1101.

⁵² *Pomeroy*, Equity Jurisprudence, § 921, and cases cited.

ally enforced, notwithstanding the Statute's requirement of a written memorandum, provided that certain steps have been taken, after the contract has been made, toward putting it into effect.

Two ideas underlie the doctrine and account for the special rules laid down by the cases—rules which at first sight seem somewhat arbitrary. Suppose one party to the oral contract, relying on the good faith of the other party, is encouraged or permitted by that other to do acts in pursuance of the contract whereby his position is irrevocably changed—acts which cannot be “undone.” Justice then demands that the other party be “estopped” from setting up the Statute as a defense. Or, suppose the act done in pursuance of the contract is one which, considered by itself, is strong circumstantial evidence of the existence of the contract—one which a bystander, wholly ignorant of the existence of the contract, would take as a sure indication that there was a contract between the parties concerning the land—then there is, in place of a written memorandum, evidence of nearly as high a grade to prove the contract's existence; though, of course, the exact *terms* of the contract must still be proved by oral evidence. Whether or not this doctrine of part performance, based upon these two ideas, was a reasonable exercise of judicial power, is a question which necessarily admits of two opinions; but the doctrine is firmly established in England and in all the state jurisdictions but four, and has even been confirmed in many of the states by the express language of the Statute.

28. Acts of part performance—Payment.—Shall specific performance of the oral land contract be granted, merely because the vendee has paid part or all of the purchase price? Applying the “estoppel” test, the act may readily be “undone” by recovery of the money in an action at law. Applying the “evidence” test, payment of money is not necessarily circumstantial evidence of any contract between the parties whatever, much less of a contract regarding a particular piece of land. Payment, therefore, is not an act which demands the specific performance of the contract.⁵³

29. Same subject—Possession—Improvements.—Suppose that the vendee, in pursuance of the contract, goes into possession of the land with the consent of the vendor; if his taking possession includes removal of his residence or place of business, it involves an expenditure of time and money which will be a dead loss to him if the vendor relies on the Statute of Frauds and ejects him. These expenditures cannot be “undone;” they are irrevocable. Also, his being in possession with the consent of the vendor is a thing which would strike a bystander as a convincing piece of circumstantial evidence that a contract relating to the land exists between him and the legal owner. The English courts established the rule, almost as soon as the Statute of Frauds was passed, that the vendee who has thus taken possession may have his oral contract enforced in equity

⁵³ *Clinan v. Cooke*, 1 Sch. & Lef. 22 (Ire.), 2 Scott, Cases on Equity, 182, 2 Keener, Equity Jurisdiction Cases, p. 628; *Lord Pengall v. Ross*, Eq. Ca. Abr. 46 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 276, 2 Scott, Cases on Equity, p. 180.

notwithstanding the Statute; justifying the rule on one or the other of the reasons stated.⁵⁴

If the vendee, in addition to taking possession, has made valuable improvements on the land the reasons for the rule are thereby strengthened.⁵⁵

30. Same subject—Continuance in possession.—Take, next, the situation where the plaintiff was already in possession—say, as a tenant under a lease which is about to expire—when the oral contract for sale or for renewal of the lease was made. Shall his continuance in possession after his lease has expired justify specific performance? Apply the two tests again. Plainly, since he has not changed his position in reliance on the oral contract, the “estoppel” test fails; the “evidence” test fails likewise, since his remaining in possession does not necessarily tend to prove a contract. The bystander, not knowing of the new contract, would infer that he was very likely a “hold-over” tenant, remaining on sufferance after the expiration of the lease.⁵⁶ If, however, he has on faith of the oral contract, made expenditures upon the land of such an amount as a tenant would not make under a lease that is about

⁵⁴ *Butcher v. Stapeley*, 1 Vern. 363 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 279, 2 Scott, Cases on Equity, p. 188, 2 Keener, Equity Jurisdiction Cases, p. 622; *Gallagher v. Gallagher*, 31 W. Va. 9, LEADING ILLUSTRATIVE CASES.

⁵⁵ The American cases, on the whole, seem to demand some act in addition to taking possession—a fact which has escaped the attention of commentators; see 36 Cyc. 656. Possession with part payment, or possession with improvements will answer. I am unable to explain the origin of this American rule: unless, possibly, it is a concession to the popular feeling that a bargain is not a bargain unless something is paid as earnest money.

⁵⁶ *Wills v. Stradling*, 3 Ves. 378 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 291, 2 Scott, Cases on Equity, p. 201, 2 Keener, Equity Jurisdiction Cases, p. 626.

expire or has expired, he has done an act which satisfies the "tests," and hence may have specific performance.⁵⁷

31. Same subject—Services.—Payment in services will not, as a general rule, take the contract out of the Statute any more than payment in money. To this rule a striking exception has been made by the majority of the recent American cases, thereby disregarding a decision⁵⁸ of great technical learning and ability made by the highest English court. Some services, say these cases, cannot be measured by their money value, and were not intended to be measured. Services of affection rendered by a child to its parent, the tender nursing and care of an aged relative, and the like, rendered as consideration for the oral promise, cannot be compensated by money damages. By the "estoppel" test, therefore, the plaintiff is entitled to specific performance. By the "evidence" test, however, the services, whether of a common or extraordinary nature, do not point to or afford circumstantial evidence of a land contract; hence the plaintiff should fail. The two tests lead to different results. Which shall control? The fact that most American courts adopt the first test⁵⁹ in preference to the second is one illustration, among

⁵⁷ *Mundy v. Joliffe*, 5 Mylne & C. 167 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 289; *Morrison v. Herrick*, 130 Ill. 631, 22 N. E. 537, 2 Keener, Equity Jurisdiction Cases, p. 706.

⁵⁸ *Maddison v. Alderson*, L. R. 8 App. Cas. 467 (H. of L.), 1 Ames, Equity Jurisdiction Cases, p. 295, 2 Scott, Cases on Equity, p. 210, 2 Keener, Equity Jurisdiction Cases, p. 675.

⁵⁹ *Vreeland v. Vreeland*, 53 N. J. Eq. 387, 32 Atl. 3; *Kofka v. Rosicky*, 41 Mo. 328, 59 N. W. 788, 43 Am. St. Rep. 685, 25 L. R. A. 207. *Contra*, *Chan v. Swan*, 48 Ohio St. 25, 26 N. E. 222, 29 Am. St. Rep. 517, 2 Keener, Equity Jurisdiction Cases, p. 726, 2 Scott, Cases on Equity, p. 219.

many, of the liberal views of American equity courts, in contrast with the over-technicality of modern English equity.

32. Partial specific performance with compensation.—It often happens that the vendor is unable to convey exactly what he contracted to convey; that the land is deficient in amount, or in quality, or is subject to an easement, or that the vendor has not a full estate in fee simple, etc. Must specific performance necessarily fail? The rules are different according as the vendor or the vendee is the plaintiff. If the vendor is suing, and the defect is unimportant—if, after making allowance for the defect the vendee will get substantially what he contracted for, the court will compel the vendee to take the land, with a deduction from the purchase price.⁶⁰ Thus, if the vendor of a large farm has no title or a bad title to ten acres of rocky pasture land of no special value to the vendee, he may have specific performance at a reduced price. If, however, the defect concerns an important or essential matter—if, for example, title to the part of the farm on which the farm buildings stood was defective—specific performance would be refused.⁶¹

Where the vendee is plaintiff, the rule is different. If he entered into the contract in ignorance of the defect, he may compel conveyance of whatever the

⁶⁰ *Halsey v. Grant*, 13 Ves. 73 (Eng.), 2 Scott, Cases on Equity, p. 379; *King v. Bordeaux*, 6 Johns. Ch. 38 (N. Y.), 10 Am. Dec. 312, 2 Keener, Equity Jurisdiction Cases, p. 1123, 2 Scott, Cases on Equity, p. 387.

⁶¹ *Perkins v. Ede*, 16 Beav. 193 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 247, 2 Keener, Equity Jurisdiction Cases, p. 1128, 2 Scott, Cases on Equity, p. 376.

andor has with a proportionate abatement from the price, even though the defect is very considerable,⁶² though the vendor owns but half the land, or owns life estate merely instead of a fee simple, etc. To this rule there is an important exception in many cases; if the defect consists in the inchoate dower interest of the vendor's wife, who has not joined in the contract, no abatement will be made; for the reason, among others, that the present value of such an interest is very difficult to estimate.⁶³ If, however, the vendee knew of the defect when he made the contract—if he entered into the contract with his eyes open—he has no claim to an abatement from the price,⁶⁴ though he may, of course, if he sees fit to accept the land with its defects, and to pay the full price, compel a conveyance of whatever the vendor is able to convey.

33. Specific performance against third persons.—If the vendor, instead of conveying to the plaintiff, purchaser, breaks his contract by conveying the legal title to a third person. A conveyance by the vendor to the original purchaser will now be useless, for he has nothing to convey. Is the purchaser, then, entitled to his remedy at law for damages? The answer may be yes or no. His "equity" (that is,

Barnes v. Wood, L. R. 8 Eq. 424 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 249, 2 Keener, Equity Jurisdiction Cases, p. 1228, 2 Scott, Cases on Equity, p. 395.

Riesz's Appeal, 73 Pa. St. 485, 1 Ames, Equity Jurisdiction, p. 254; *Ter v. Levy*, 26 N. J. Eq. 330, 2 Keener, Equity Jurisdiction Cases, p. 236.

Castle v. Wilkinson, L. R. 5 Ch. App. 534 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 252, 2 Keener, Equity Jurisdiction Cases, p. 1208, 2 Scott, Cases on Equity, p. 395.

his right to an equitable remedy) having once attached to the land follows the land until it comes into the hands of the purchaser of the legal title who is a *bona fide purchaser for a valuable consideration and without notice*. If the third person who received the legal title is a *volunteer*; that is, if he paid no valuable consideration for his purchase; or if before paying the price and receiving the legal title he had *notice* of the original purchaser's contract right and resulting "equity" of specific performance, he takes the legal title subject to the plaintiff's "equity": the plaintiff may enforce the remedy of specific performance against him as freely and on the same terms as against the vendor if the vendor had retained the title. This is a doctrine of equity of far reaching importance. What is meant by "valuable consideration" and by "notice" will be explained in a later chapter.⁶⁵

34. **Same subject—Equitable easements.**—A makes a deed of land to B; B at the same time covenants with A, in behalf of himself, his heirs and assigns, restricting the use of the land in some way; for example, that it shall not be used except for dwelling house purposes, or that intoxicating liquors shall not be sold on the premises, or the like. Now, as this is a negative agreement concerning land, and the damage to A from its breach is conjectural, or hard to estimate, A is clearly entitled to enjoin a breach of it by B. How about a breach of it by B's successor in interest? Applying the principle of the last paragraph, so long as B's successor in the legal

⁶⁵ See Chapter XIV.

title is a volunteer or a purchaser with notice of the covenant, the covenant may be specifically enforced by means of an injunction against its breach.⁶⁶

May anyone besides A enforce the covenant against B or B's successor? Suppose A originally owned two adjoining lots and sold one of them to B with a restrictive covenant as above. A's intent in inserting the covenant in the deed may have been merely to secure his own personal comfort and freedom from annoyance so long as he remained owner of the other lot; or his intention may have been permanently to benefit the other lot, in whosoever hands it may come. If the latter is proved, by circumstances, or otherwise, to have been A's intent, C, the purchaser of the other lot from A, acquires not only A's interest in the lot, but also A's interest in B's covenant. C or C's successors in the second lot, therefore, may enjoin the breach of the covenant by B or B's successors.⁶⁷

35. Same subject—Equitable easements continued.—Covenants like these, creating "equitable easements," as they are sometimes called, have become very common in American cities, and are of great value in preserving the character and value of city land for residence purposes. A common example is presented where a suburban tract is subdivided and sold in lots, each deed containing simi-

⁶⁶ *Tulk v. Moxhay*, 2 Phill. Ch. 774, 777 (Eng.), 1 Ames, *Equity Jurisdiction Cases*, p. 147, 2 Keener, *Equity Jurisdiction Cases*, p. 545, 2 Scott, *Cases on Equity*, p. 486; *Whitney v. Union Ry.*, 11 Gray 359 (Mass.), 71 Am. Dec. 715, 2 Keener, *Equity Jurisdiction Cases*, p. 547.

⁶⁷ *Peck v. Conway*, 119 Mass. 546, 1 Ames, *Equity Jurisdiction Cases*, p. 162, 2 Scott, *Cases on Equity*, p. 527, 2 Keener, *Equity Jurisdiction Cases*, p. 509; *Badger v. Boardman*, 16 Gray 559 (Mass.), 2 Keener, *Equity Jurisdiction Cases*, p. 473.

lar restrictive covenants regarding the size and location of houses, etc. It will be inferred that the covenant in each deed is for the benefit not merely of the speculator who sells the lots, but for each and every other lot owner in the entire "building scheme."⁶⁸

The injunction by which such covenants are enforced is really a suit for specific performance, and hence subject to the same equitable defenses. Suppose B's covenant with A was, not to use the land for business purposes. In the course of time, the neighborhood, originally residential, has, with the growth of the city, become devoted to business chiefly. To enforce the covenant, therefore, will be of little or no benefit to A, while B by such enforcement, will be deprived of the most profitable use of his land. The purpose of the restriction has, by force of circumstances, entirely failed. Equity, therefore, will not impose upon B or his successors the hardship of complying with the covenant.⁶⁹

36. Death of parties to contract.—A contracts to convey land to X by a valid contract, and X then dies before the contract is carried out, leaving Y, X's personal representative (administrator) and Z, X's heir. Who succeeds to the benefit of the contract? X, before his death, had no legal title; how,

⁶⁸ Nottingham, etc., Co. v. Butler, L. R. 16 Q. B. D. 778 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 169, 2 Scott, Cases on Equity, p. 530, 2 Keener, Equity Jurisdiction Cases, p. 519; De Gray v. Monmouth Beach Clubhouse Co., 50 N. J. Eq. 329, 24 Atl. 388, 2 Scott, Cases on Equity, p. 534.

⁶⁹ Jackson v. Stevenson, 156 Mass. 496, 31 N. E. 691, 32 Am. St. Rep. 476, 1 Ames, Equity Jurisdiction Cases, p. 179, LEADING ILLUSTRATIVE CASES; Trustees of Columbia College v. Thacher, 87 N. Y. 311, 41 Am. Rep. 365, 2 Keener, Equity Jurisdiction Cases, p. 1038.

then, can Z, on X's death, have any interest in the land by inheritance?

We find that equity attributes to the contract the remarkable effect that from the moment it is made, the vendee, X, is regarded as the *real owner* in equity. He owns an *equitable estate* in the land; though until conveyance the legal title is still in A, the vendor. There is a maxim, of which this is one of several applications, that "Equity looks upon that as done which ought to be done."⁷⁰ The vendor "ought"—that is, he owes a legal duty—to convey. In determining what property rights the parties to the contract have, equity treats the situation as if this duty had been accomplished and the conveyance actually made. Since X was owner, Z, his heir, inherits his equitable ownership and can call on A for a conveyance. Y, the administrator, however, must pay the dead man's debts out of the personal estate; Z, therefore, may compel Y to pay the purchase price.⁷¹

Suppose A, the vendor, dies, leaving B, his administrator, and C, his heir. The legal title to the land, of course, descends to C; the equitable title, from the date of the contract, has passed to X. What interest remained in A after the contract, other than his legal title to the land? Plainly, only the claim on X for the purchase money. It is sometimes said that A's interest is *converted* by the contract from land to personal assets. The claim for the money,

⁷⁰ See § 227.

⁷¹ *Milner v. Mills*, Mos. 123 (Eng.), 1 Ames, Equity Jurisdiction Cases, 191; *Langford v. Pitt*, 2 P. Wms. 629 (Eng.), 2 Scott, Cases on Equity, 405, 2 Keener, Equity Jurisdiction Cases, p. 333.

like other personal claims, passes on A's death to B, his administrator. B, therefore, may sue X for the purchase money, compelling C, the heir, to convey the land to X.⁷²

37. Vendor's lien.—A, the vendor, retains the legal title to the land. Unless the contract otherwise provides, he is not compelled to part with the legal title to X until he has received the purchase money. His situation is very similar to that of a mortgagee. A mortgagee receives from the mortgagor a conveyance of land and may retain the legal title until his debt is paid. The analogy of vendor to mortgagee is almost complete. Both have an *equitable lien* on the land to secure the payment of a sum of money. Such lien may be defined, at present, as a right to *foreclose*—that is, to have a sale made of the land affected by the lien, under the direction of the court, as a result of a foreclosure suit. If the vendee delays beyond the day appointed by the contract for the payment of the money, the vendor may get his money by foreclosure suit and sale.⁷³

Suppose the vendor assigns his claim for the purchase money; the assignee, of course, succeeds to the vendor's personal claim against the vendee. Does he get anything else? Does he get this vendor's lien which we have just described?

⁷² Bubb's Case, 2 Freem. Ch. 38 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 194; Keep. v. Miller, 42 N. J. Eq. 100, 6 Atl. 495, 1 Keener, Equity Jurisdiction Cases, p. 328, H. & B. 157.

⁷³ Haughwout v. Murphy, 22 N. J. Eq. 531; Button v. Schroyer, 5 Wis. 598, 1 Ames, Equity Jurisdiction Cases, p. 225; Lewis v. Hawkins, 23 Wall. 119 (U. S.), H. & B. 665.

There seems to be some difficulty here. The vendor has assigned his debt, but not the legal title to the land by which the debt is secured. How can a person have the benefit, as security, of property the title to which is in another? The difficulty is not insuperable. Equity holds that the lien of the security, whether it be a mortgage or the vendor's legal title, follows the debt as the shadow follows the substance. The assignment of the debt carries with it the lien in equity. The vendor holds the naked legal title for the benefit of his assignee, to secure the payment of the debt; the assignee may, therefore, bring a suit to foreclose the vendor's lien, making the vendor a party, and have a judicial sale of the property to raise the money just as the vendor himself could have done if he had retained the ownership of the debt.⁷⁴

38. Waste or destruction of the premises.—If the vendor remains in possession, by himself or another, after the contract, he must bear in mind that the substantial ownership of the property is now in the vendee. He must, therefore, take the same care of the premises that is required of a trustee with reference to property under his control.⁷⁵ On the other hand, if the purchaser goes into possession before paying the price in full, he must recognize the fact

⁷⁴ *Graham v. McCampbell*, Meigs 52 (Tenn.), 33 Am. Dec 126, 1 Ames, *Equity Jurisdiction Cases*, p. 205.

⁷⁵ *Clarke v. Ramuz*, (1891) 2 Q. B. 456 (Eng.), 1 Ames, *Equity Jurisdiction Cases*, p. 222, 2 Keener, *Equity Jurisdiction Cases*, p. 380, 2 Scott, *Cases on Equity*, p. 424; *Bostwick v. Beach*, 105 N. Y. 661, 12 N. E. 32, H. & B. 663.

that the vendor retains the legal title as security, and must not commit such waste as will impair the value of his security; such waste on his part may be enjoined by the vendor.⁷⁶

If the premises are accidentally destroyed by fire or earthquake after the making of a valid contract of sale, who shall bear the loss? Equity follows out the principle to its logical consequences. Ownership in equity devolved on the purchaser as soon as the contract was made; therefore, the loss is his. The vendor may have specific performance of the contract without deduction from the price because of the loss. It makes no difference (according to the great weight of authority) that the vendor was in possession when the loss occurred.⁷⁷ Of course, if the fire was caused by the vendor's negligence, the rule is otherwise. If the vendor had insurance on the premises, he holds the insurance money collected for the benefit of the purchaser, since the vendor is trustee of the property and its proceeds for the purchaser.⁷⁸

39. Summing up specific performance.—Consider the important general principles or subjects of equity which have been illustrated by these special

⁷⁶ *Crockford v. Alexander*, 15 Ves. 138 (Eng.), 1 Ames, *Equity Jurisdiction Cases*, p. 221, 1 Keener, *Equity Jurisdiction Cases*, p. 549.

⁷⁷ *Paine v. Meller*, 6 Ves. 349 (Eng.), 1 Ames, *Equity Jurisdiction Cases*, p. 227, 2 Keener, *Equity Jurisdiction Cases*, p. 403, 2 Scott, *Cases on Equity*, p. 450; *Brewer v. Herbert*, 30 Md. 301, 96 Am. Dec. 582, 1 Scott, *Cases on Equity*, p. 425, 2 Keener, *Equity Jurisdiction Cases*, p. 421, *LEADING ILLUSTRATIVE CASES*.

⁷⁸ *Reed v. Lukens*, 44 Pa. St. 200, 84 Am. Dec. 425 and note, 2 Scott, *Cases on Equity*, p. 455; *contra*, *Rayner v. Preston*, L. R. 18 Ch. Div. 1 (Eng.), 1 Ames, *Equity Jurisdiction Cases*, p. 229, 2 Scott, *Cases on Equity*, p. 458.

rules governing this equitable remedy. (1) The general principle of jurisdiction, that a court of equity will not take jurisdiction where there is an adequate remedy at law.⁷⁹ Several of the general maxims of equity, viz.: (2) Equity looks at the substance of the transaction, not the form.⁸⁰ (3) Equity regards that as done which ought to be done.⁸¹ (4) He who seeks equity must do equity.⁸² (5) He who comes into equity must come with clean hands.⁸³ (6) The general doctrine as to bona fide purchaser without notice.⁸⁴ (7) Distinctive rules of equity as to fraud; especially (8) the doctrine that the Statute of Frauds shall not be made an instrument of fraud. (9) Inadequacy of consideration as a defense or ground of relief.⁸⁵ (10) Mistake.⁸⁶ (11) Equitable estates.⁸⁷ (12) Equitable liens, their enforcement and assignment.⁸⁸ (13) The duties of a trustee.⁸⁹

⁷⁹ See § 229.

⁸⁰ See § 226.

⁸¹ See § 227.

⁸² See §§ 219, 220.

⁸³ See §§ 221, 222.

⁸⁴ See §§ 207-211.

⁸⁵ See § 176.

⁸⁶ See §§ 67-81.

⁸⁷ See § 118.

⁸⁸ See §§ 161-163, 154.

⁸⁹ See § 135.

CHAPTER III.

INJUNCTIONS.

40. **Injunctions—Torts.**—Equity has jurisdiction over torts chiefly by means of the remedy of injunction—an order not to commit the threatened tort, under penalty of punishment for contempt. This is the ordinary preventive injunction. To a limited extent, equity may order the person committing the tort to restore things to the condition in which they were before the tort was committed. This is a mandatory injunction. Injunction may issue at the end of the suit, in which case it is called final; or at the beginning or during the progress of the suit, in which case it is called, variously, a preliminary, temporary or interlocutory injunction.

41. **Waste.**—The term “waste” is here used in its technical legal sense, implying that the person permitting or doing the wrongful or destructive act is in rightful possession of the premises—usually as a tenant for life or tenant for years. If he is in wrongful possession then the tort is trespass.

Nearly all acts of waste which would give rise to an action of law may be enjoined. The commonest acts are, cutting timber,⁹⁰ mining or quarrying,⁹¹

⁹⁰ Kane v. Vandenburg, 1 Johns. Ch. 11 (N. Y.), 1 Keener, Equity Jurisdiction Cases, p. 455, 1 Scott, Cases on Equity, p. 661.

⁹¹ Whitfield v. Bewit, 2 P. Wms. 240 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 450, 1 Keener, Equity Jurisdiction Cases, p. 457, 1 Scott, Cases on Equity, p. 674.

changing, destroying, or removing buildings.⁹² Equity also intervenes by injunction in a number of instances, which need not be particularized, where technical legal rules as to parties do not permit an action at law to lie.⁹³ A common situation is that where a mortgagee or other lien holder sues to prevent waste by the mortgagor or other person in possession, on the ground that it threatens to impair the sufficiency of his security—that is, that the waste renders it probable or possible that a foreclosure sale will not yield the full amount of the debt.⁹⁴ Another frequent occasion for granting a writ of injunction is waste by a tenant in common in possession committing acts that a prudent manager would not commit.⁹⁵

The plaintiff may not sue in equity merely to obtain an accounting for waste that has already been committed, since the legal action for damages is an adequate remedy.⁹⁶ But, if he sues for and obtains an injunction against future waste, the court of equity, in order to save him the trouble and expense

⁹² *Klie v. Von Broock*, 56 N. J. Eq. 18, 37 Atl. 469, 1 Scott, Cases on Equity, p. 668.

⁹³ *Mollineux v. Powell*, 3 P. Wms. 268 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 468, 1 Scott, Cases on Equity, p. 664; *Skelton v. Skelton*, 2 Swanst. 170 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 473, 1 Keener, Equity Jurisdiction Cases, p. 430, 1 Scott, Cases on Equity, p. 656.

⁹⁴ *Usborne v. Usborne*, Dick. 75 (Eng.), 1 Keener, Equity Jurisdiction Cases, p. 452; *Brady v. Waldron*, 2 Johns. Ch. 148 (N. Y.), 1 Ames, Equity Jurisdiction Cases, p. 483, 1 Scott, Cases on Equity, p. 661.

⁹⁵ *Hawley v. Clowes*, 2 Johns. Ch. 122 (N. Y.), 1 Ames, Equity Jurisdiction Cases, p. 484, 1 Scott, Cases on Equity, p. 663.

⁹⁶ *Jesus College v. Bloom*, Amb. 54 (Eng.), 3 Atk. 262 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 481, 1 Keener, Equity Jurisdiction Cases, p. 404, 1 Scott, Cases on Equity, p. 115; *Watson v. Hunter*, 5 Johns. Ch. 169 (N. Y.), 9 Am. Dec. 295, 1 Scott, Cases on Equity, p. 642.

of a separate action for the past waste, will give him an accounting.⁹⁷ We have here an illustration of a general principle of equity jurisdiction, applying to all its remedies, that the court of equity, having obtained jurisdiction for one purpose, will retain it for the purpose of complete relief, so as to dispose of the whole controversy in a single suit; and this is true, although some of the relief asked is of such a nature that the remedy at law is ordinarily adequate.⁹⁸

42. **Equitable waste.**—Several centuries ago, in order to relieve the life tenant or other holder of an estate less than a fee from the onerous responsibility for technical waste, it became common to insert in family settlements the words “without impeachment of waste.” These words were interpreted by the law courts as giving the tenant a free hand to commit any acts of destruction upon the premises. He might strip the land of all its timber, or tear down the mansion home, with perfect impunity, purely out of motives of malice toward his successor in the estate. Equity, thereupon, stepped in and invented its doctrine of “equitable waste”; i. e., acts such as destruction of buildings, and cutting of ornamental trees, though done by a tenant “without impeachment of waste,” who is therefore legally irresponsible, will be enjoined. Equity, it is said, “will not permit an unconscientious use to be made of a legal power.” There has been little occasion for American courts to apply this doctrine; it is men-

⁹⁷ *Jesus College v. Bloom*, note 96.

⁹⁸ See § 230.

tioned because there is no doctrine more characteristic of the spirit of equity jurisprudence.⁹⁹

43. **Trespass—Grounds for injunction.**—Courts of equity, though they have been enjoining waste for centuries, did not begin to enjoin trespass until about one hundred years ago. Traces of this early reluctance to interfere are found in the decisions of many American courts to this day. In every case the main question is, has the plaintiff an adequate remedy at law, either by the action of trespass, or (where defendant is in possession) by ejectment? If the acts of trespass are few or temporary, causing no serious injury, equity will not interfere. Thus, when A was given a certain time to remove a pile of bricks belonging to him from B's premises and failed to remove them within the time, equity would not prohibit A from entering on B's premises a few times without authority for the purpose of removing the bricks.¹ If, however, the injury is "irreparable"—incapable of repair—an injunction will lie. While there is some difference of opinion as to the meaning of this word "irreparable," most cases hold that removing or destroying the substance of the estate of the plaintiff is of itself an "irreparable" injury, even though the plaintiff is not damaged to a large amount. Thus, removing buildings,² taking ore or

⁹⁹ *Vane v. Lord Barnard*, 2 Vern. 738 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 470, 1 Keener, Equity Jurisdiction Cases, p. 455; *Micklethwait v. Micklethwait*, 1 De G. & J. 504, 524 (Eng.); *Turner v. Wright*, 2 De G. F. & J. 234, 243 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 476, 1 Keener, Equity Jurisdiction Cases, p. 441.

¹ *Gates v. Johnstown Lumber Co.*, 172 Mass. 495, 52 N. E. 736, 1 Ames, Equity Jurisdiction Cases, p. 520.

² *Echelkamp v. Schrader*, 45 Mo. 505, 1 Ames, Equity Jurisdiction Cases, p. 511.

stone,³ cutting timber⁴ (by the majority rule), fall within the definition. Where the defendant was about to run a tunnel under the plaintiff's land, far beneath the surface, and threatening no injury to the surface, it was properly held that the act was irreparable, since though in a sense harmless, it involved the removal of a part of the substance of the earth belonging to the plaintiff.⁵ Closely akin to the last case is another ground for injunction; the defendant must not be permitted to appropriate to himself permanently, without authority, land which the plaintiff owns, even though the land itself be of little value to the plaintiff. Defendant's willingness and ability to pay damages does not justify him in taking his neighbor's land. Thus, in a leading English case, a water company laid pipes through a street the soil of which was owned by the plaintiff. The pipes did the plaintiff no harm; yet he was entitled to an injunction. The real value of the land to the plaintiff lay in the fact that his ownership of the land, otherwise useless to him, enabled him to exact a price from the defendant for its use.⁶

Again, suppose a defendant is committing numerous trespasses—for example, is repeatedly tearing

³ Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1116, 1 Ames, Equity Jurisdiction Cases, p. 507, 1 Scott, Cases on Equity, p. 704, 1 Keener, Equity Jurisdiction Cases, p. 634.

⁴ Lowndes v. Bettle, 3 New. R. 409 (Eng.), 33 L. J. Ch. 451, 10 Jur. N. S. 226, 1 Ames, Equity Jurisdiction Cases, p. 499, 1 Scott, Cases on Equity, p. 697, 1 Keener, Equity Jurisdiction Cases, p. 604; Griffith v. Hilliard, 64 Vt. 643, 25 Atl. 427, 1 Keener, Equity Jurisdiction Cases, p. 636, H. & B. 762.

⁵ Richards v. Dower, 64 Cal. 62, 28 Pac. 113, 1 Ames, Equity Jurisdiction Cases, 517.

⁶ Goodson v. Richardson, L. R. 9 Ch. 221 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 502, 1 Keener, Equity Jurisdiction Cases, p. 615.

down plaintiff's fence, or crossing plaintiff's land, and threatens to continue his trespasses indefinitely. Each trespass in itself is trifling; but plaintiff, in the long run will have to bring numerous actions at law for damages. This fact affords an independent reason for injunction, without regard to the seriousness of the injury. Avoidance of a multiplicity of suits is an important ground of equity jurisdiction.⁷

44. Same subject—Title in dispute—Preliminary injunction.—If the defendant sets up that he is the true owner and that therefore the alleged acts of trespass are the lawful exercise of his rights of ownership; as, for example, where the defendant claims to own the strip of land on which plaintiff's house is situated, and is proceeding to tear down and remove the house—plainly, the plaintiff cannot have a permanent injunction until the title to the land is in some way settled in plaintiff's favor.⁸ Where the title is thus in dispute, equity has the power to decide the question of title itself; but the more usual practice is to await the establishment of the disputed title by trial in a court of law.⁹ Meanwhile, must the plaintiff submit to having the house torn down? If the injury threatened is of the "irreparable" class, a preliminary injunction will issue pending the determination at law of the plaintiff's rights.¹⁰ Where,

⁷ *Musselman v. Marquis*, 1 Bush 463 (Ky.), 89 Am. Dec. 637, 1 Keener, *Equity Jurisdiction Cases*, p. 193.

⁸ *Echelkamp v. Schrader*, 45 Mo. 505, 1 Ames, *Equity Jurisdiction Cases*, p. 511.

⁹ *Griffith v. Hilliard*, 64 Vt. 643, 25 Atl. 427, 1 Keener, *Equity Jurisdiction Cases*, p. 636, H. & B. 762.

¹⁰ *Erhardt v. Boaro*, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1116, 1 Ames, *Equity Jurisdiction Cases*, p. 507, 1 Keener, *Equity Jurisdiction Cases*, p. 624, 1 Scott, *Cases on Equity*, p. 704.

however, the injury is not irreparable, but is in the "continuous or repeated trespass" class, it seems that the case does not call for a preliminary injunction, though it may demand a permanent injunction after the plaintiff's rights are settled; for the plaintiff can hardly be involved in any serious "multiplicity of suits" by the trespasses of the defendant during the limited period while the trial at law is going on.¹¹ If defendant is in possession, the court should be careful to avoid enjoining him from the ordinary, non-destructive use of the premises, pending the ejectment suit.¹²

45. Same subject—Mandatory injunction.—If the defendant's trespass consisted in the erection of buildings, structures or obstructions on the plaintiff's land, mandatory injunction is the remedy to compel their removal.¹³ Where the defendant has thus willfully encroached upon the plaintiff's property, such injunction should issue, though the loss occasioned to the defendant by the removal is much greater than the value of the land to the plaintiff. A man may not force a sale to him by his neighbor by the mere act of building on his neighbor's land. If, however, the encroachment is slight, and resulted from an innocent mistake as to the true boundary, there is authority for holding that the court will

¹¹ *New York, etc. Establishment v. Fitch*, 1 Paige 97 (N. Y.), 1 Keener, Equity Jurisdiction Cases, p. 502.

¹² *Snyder v. Hopkins*, 31 Kan. 557, 3 Pac. 367, 1 Ames, Equity Jurisdiction Cases, p. 509.

¹³ *London, etc. Ry. Co. v. Lancashire, etc. Ry. Co.*, L. R. 4 Eq. 174, 1 Ames, Equity Jurisdiction Cases, p. 525; *Wheelock v. Noonan*, 108 N. Y. 179, 15 N. E. 67, 2 Am. St. Rep. 405, 1 Ames, Equity Jurisdiction Cases, p. 527, 1 Keener, Equity Jurisdiction Cases, p. 194, 1 Scott, Cases on Equity, p. 94, H. & B. 764, LEADING ILLUSTRATIVE CASES.

deny the injunction and leave the plaintiff to his remedy at law.¹⁴

46. **Trespass to personal property.**—Detention of, or injury to, or conversion of personal property is rarely enjoined; since damages recovered at law will usually compensate the plaintiff for the detention, or enable him to repair or replace the injured or converted chattel. If, however, the chattel is of the kind which cannot be replaced, its conversion may be enjoined. The rules are practically the same as those relating to specific performance of chattel contracts. Sometimes, too, the conversion may result in damage of a serious nature, but too remote to be the subject of recovery in an action at law. Thus, suppose the judgment creditor of B, claiming that A's stock of goods really belong to B, directs the sheriff to levy execution thereon. A's business may be ruined, and A reduced to bankruptcy by the execution sale; but the damages which A can recover for the conversion will not include this remote injury, but only the value of the goods. A, therefore, needs an injunction against the threatened sale, until the ownership of the goods is determined.¹⁵

47. **Nuisance—What nuisances are enjoined.**—In determining what constitutes a nuisance equity follows the law. If the acts complained of do not warrant an action at law for damages, they do not authorize an injunction. "There is no such thing as

¹⁴ *Lynch v. Union Instit.*, 159 Mass. 306, 34 N. E. 364, 20 L. R. A. 842, 1 Keener, *Equity Jurisdiction Cases*, p. 647; *Hunter v. Carroll*, 64 N. H. 572, 15 Atl. 17, 1 Ames, *Equity Jurisdiction Cases*, p. 529.

¹⁵ *Watson v. Sutherland*, 5 Wall. 74 (U. S.), 18 L. Ed. 580, 1 Ames, *Equity Jurisdiction Cases*, p. 531, H. & B. 741, 1 Scott, *Cases on Equity*, p. 134.

an equitable nuisance," in the sense of something actionable in equity but not at law.¹⁶ The general grounds for exercising equitable jurisdiction are the same as those in trespass cases, viz., irreparable injury, or multiplicity of suits from the continuance or repetition of the nuisance. As in the case of trespass, an occasional or temporary nuisance, not productive of serious injury, will not be enjoined.¹⁷ A continuing nuisance may be enjoined, though the damages that would be recovered in an action at law would be small; such a nuisance as the pollution of a stream, rendering it unfit for domestic use, although the plaintiff would not have used the stream if it had been left unpolluted.¹⁸

48. Same subject—Trial at law.—If it is doubtful whether a nuisance really exists, the usual practice is to settle the question by a trial at law before granting a permanent injunction. If, however, the existence of the nuisance seems to the equity court to be clear, the injunction will issue without requiring the verdict of a jury.¹⁹

49. Same subject—Preliminary injunction.—As serious injury may result to the plaintiff from the continuance of the alleged nuisance during the progress of the trial in equity, or at law, a preliminary

¹⁶ *Soltau v. De Held*, 2 Sim. N. S. 133, 151 (Eng.), 1 Keener, *Equity Jurisdiction Cases*, p. 665, 1 Scott, *Cases on Equity*, p. 717.

¹⁷ *Swaine v. Great Northern Ry. Co.*, 4 De G. J. & S. 211 (Eng.), 1 Ames, *Equity Jurisdiction Cases*, p. 569, 1 Scott, *Cases on Equity*, p. 743.

¹⁸ *Mann v. Willey*, 51 App. Div. 169 (N. Y.), 64 N. Y. Sup. 589, 1 Ames, *Equity Jurisdiction Cases*, p. 572; affirmed, 168 N. Y. 664, 61 N. E. 1131.

¹⁹ *Crowder v. Tinkler*, 19 Ves. 617 (Eng.), 1 Ames, *Equity Jurisdiction Cases*, p. 555; *Turner v. Mirfield*, 34 Beav. 390 (Eng.), 1 Ames, *Equity Jurisdiction Cases*, p. 558; *Dwight v. Hayes*, 150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218.

injunction is often appropriate although the existence of the nuisance is disputed. In doubtful cases the court will often "balance the injuries," as it is called. Whether the court grants or refuses the injunction on incomplete evidence, in advance of trial, it is in danger of making a mistake—it is in danger, on the one hand, of enjoining an act which, it may turn out, the defendant may lawfully do; or, on the other hand, of refusing to aid a plaintiff who needs immediate relief and turns out to be entitled to relief. In doubtful cases, therefore, the court considers which party has most at stake—which will suffer most by the granting or refusal of the injunction. If to issue the preliminary injunction will do great damage to defendant—will, for example, put a stop to a valuable business—while allowing the alleged nuisance to continue pending the suit will be comparatively a slight inconvenience to plaintiff, the court will refuse the injunction.²⁰ If, on the other hand, the plaintiff will suffer a greater injury by allowing the acts to continue during trial than the defendant will suffer by enjoining them at once, the preliminary injunction will be issued.²¹

50. Same subject—Decree—As to balancing of injuries.—Some American courts have been persuaded to apply the same process of balancing the respective injuries to the parties in deciding whether a final injunction shall be granted against a proved

²⁰ Eaden v. Firth, 1 Hen. & M. 573 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 564; Herbert v. Pennsylvania Co., 43 N. J. Eq. 21, 10 Atl. 872, 1 Keener, Equity Jurisdiction Cases, p. 860.

²¹ Pollock v. Lester, 11 Hare 266 (Eng.), 1 Keener, Equity Jurisdiction Cases, p. 837.

nuisance. Thus, in a Pennsylvania case, the defendant's extensive iron furnaces were located at the foot of a bluff, the plaintiff's dwelling house and small cotton factory on the summit. Soft coal smoke from defendant's chimneys greatly injured plaintiff; but to discontinue the use of soft coal, which was necessary to the successful prosecution of the defendant's business, meant the closing down of his plant. The nuisance to the plaintiff was serious and undoubted; injunction was refused solely on the ground that the defendant's investment was very large compared with the plaintiff's.²² In a few cases an additional reason appears, in that the interruption of defendant's business would inconvenience the public; as where defendant's waterworks, which created a smoke nuisance to plaintiff, furnished the only reliable means of extinguishing fires in a city.²³ But this idea, that after the plaintiff's rights are clearly proved, the injuries may still be balanced and a decree refused, has been emphatically rejected by the English and a majority of the American courts. Enjoining a proved nuisance, destructive of the enjoyment of plaintiff's estate, is not a matter of discretion, but of strict right.²⁴ It is the only mode in which the plaintiff can be effectually protected in his rights of property. Refusal of an injunction

²² Richards' Appeal, 57 Pa. St. 105, 98 Am. Dec. 202, 1 Ames, Equity Jurisdiction Cases, p. 574. See, also, Mountain Copper Co. v. United States, 142 Fed. 625, 1 Scott, Cases on Equity, p. 759.

²³ Daniels v. Keokuk Waterworks, 61 Iowa 549, 16 N. W. 705, 1 Ames, Equity Jurisdiction Cases, p. 585.

²⁴ Hennessy v. Carmony, 50 N. J. Eq. 616, 25 Atl. 374, 1 Ames, Equity Jurisdiction Cases, 578, 1 Keener, Equity Jurisdiction Cases, p. 806, 1 Scott, Cases on Equity, p. 752, LEADING ILLUSTRATIVE CASES.

amounts to a license to appropriate one's neighbor's land for one's private use, on payment of such damages as a jury may from time to time award. "The necessities of one man's business cannot be the standard of another man's rights."²⁵ The fact that defendant's business is a public benefit may be a proper argument to call for legislation giving him the power of eminent domain, but is not a consideration which should induce the courts to dispense with such legislation, to the sacrifice of rights of private property.²⁶

51. Same subject—Laches—Form of decree.—That the right to an injunction against a nuisance is not a matter of favor or discretion is also illustrated by the rule that plaintiff does not lose his remedy by mere laches or delay, unless, indeed, he waits so long that his legal right is also lost and the defendant acquires a right by prescription to commit the nuisance.²⁷ Where the circumstances require, a mandatory injunction ordering the defendant to remove his structures which cause the nuisance, is as much a matter of course as an ordinary preventive injunction.²⁸ As in cases of waste, the decree should include damages for the past injury.²⁹

²⁵ *Chestatee Pyrites Co. v. Cavenders, etc. Co.*, 118 Ga. 255, 45 S. E. 267, 119 Ga. 354, 46 S. E. 422, 100 Am. St. Rep. 174. See cases collected, 1 *Pomeroy, Equitable Remedies*, § 530, note 115.

²⁶ *Shelfer v. London El. L. Co.*, (1895) 1 Ch. 287 (Eng.), 1 Ames, *Equity Jurisdiction Cases*, p. 589.

²⁷ *Galway v. Metropolitan Elevated Ry. Co.*, 128 N. Y. 132, 28 N. E. 479, 13 L. R. A. 788, 1 Ames, *Equity Jurisdiction Cases*, p. 600, 1 Keener, *Equity Jurisdiction Cases*, 822.

²⁸ *Corning v. Troy, etc. Factory*, 40 N. Y. 191, 1 Keener, *Equity Jurisdiction Cases*, p. 814.

²⁹ *Pomeroy, Equity Jurisprudence*, § 237.

52. Public nuisance.—A public nuisance may be enjoined at the suit of the attorney-general or other officer representing the state or municipality;³⁰ but will not be enjoined at the suit of a private person, unless he shows that it causes him some special injury in addition to that which he suffers as a member of the community.³¹

53. Infringement of patent rights.—Suits for infringement of patent rights are almost always in equity. Injunction lies on the ground of avoiding a multiplicity of suits, since the infringement is in its nature a continuous act. The suit involves two questions—whether the plaintiff's patent is a valid one, and whether it is infringed or copied by the defendant's machine or process. These are apt to be complicated questions, demanding much technical evidence, and hence are usually tried by the court without the aid of a jury. Says a distinguished federal judge: "When one remembers the careful study of intricate machinery, the manipulation of models, the reading and re-reading of technical evidence, the elaborate comparison of documents couched in language which certainly is not that of common speech, the close, hard thinking, sometimes prolonged for weeks, which, in the case of a complicated patent, has to be gone through with, before a judge, however long his experience with such causes, is able to reach a conclusion on the issues of fact, which, even if erroneous, presents at least the

³⁰ Attorney-General v. Williams, 174 Mass. 476, 55 N. E. 77, 1 Ames, Equity Jurisdiction Cases, p. 619; State v. Ohio Oil Co., 150 Ind. 21, 47 L. R. A. 627, 49 N. E. 809, 1 Scott, Cases on Equity, p. 731.

³¹ 4 Pomeroy, Equity Jurisprudence (3d ed.), § 1349.

appearance of a logical train of reasoning in its support, it seems safe to say, *a priori*, that the decision of such questions by an ordinary jury, imprisoned for a few hours, with naught but their vague recollections of the evidence, would be a lottery.”³²

54. Same subject—Preliminary injunction.—Since a preliminary injunction in a patent suit is apt to mean putting a stop to defendant’s business, the court requires a strong case to warrant an injunction in advance of trial. The plaintiff must prove the infringement, of course, and he must prove that his own patent is valid. The fact that letters patent were issued to him by the patent office does not raise a strong enough presumption of validity; he must also show that the public has acquiesced in his claim; or else that in a prior suit against other parties his patent has been adjudged to be valid. Even this prior adjudication is not absolutely conclusive; for the defendant in the present suit may introduce new evidence which will show that the prior decision in the plaintiff’s favor was wrong, or that the prior litigation was collusive—a sham, not a real contest.³³

55. Same subject—Complete relief.—As in cases of waste and nuisance, the plaintiff in the injunction suit may also have in addition to the injunction, pecuniary relief, under the general principle that jurisdiction acquired for one purpose will be re-

³² Lacombe, Cir. J. in the case of *Wyckoff v. Wagner Typewriter Co.*, 88 Fed. 515.

³³ *Edison Electric Co. v. Beacon, etc. Co.*, 54 Fed. 678, 1 Ames, Equity Jurisdiction Cases, p. 630; *Standard Elevator Co. v. Crane El. Co.*, 56 Fed. 718, 6 C. C. A. 100, 1 Ames, Equity Jurisdiction Cases, p. 663.

tained for the purpose of awarding complete relief.³⁴ This relief generally takes the form of an account of profits made by the defendant. "Profits are the gains or savings made by the wrong-doer by the invasion of the complainant's property-right in his patent. They are the direct pecuniary benefits received, and are capable of direct measurement."³⁵ But a bill in equity does not lie for a mere account of profits for a past infringement; the accounting is incidental to the injunction suit.³⁶ If, however, the plaintiff is properly in court, suing for an injunction and an accounting, and the patent expires during the suit, the suit is not necessarily at an end,³⁷ but may be retained for an accounting. Similarly, where the injunction fails by the death of the defendant pending suit, an accounting of profits may be had against his estate.³⁸

56. Copyrights and literary property.—Injunction against infringement of copyrights is governed by very much the same rules as injunction against infringement of patents. The plaintiff need not show that he was actually damaged by the piracy.³⁹ A decree for permanent injunction may include an account of defendant's profits.⁴⁰ If the plaintiff's book or play is immoral, the maxim, "He who comes into equity must come with clean hands" applies,

³⁴ See § 230.

³⁵ *Head v. Porter*, 70 Fed. 498, 1 Ames, Equity Jurisdiction Cases, p. 644.

³⁶ *Root v. Lake Shore & M. S. R. Co.*, 105 U. S. 189, 26 L. Ed. 975.

³⁷ *Clark v. Wooster*, 119 U. S. 322, 7 Sup. Ct. 217, 30 L. Ed. 392.

³⁸ *Head v. Porter*, 70 Fed. 498, 1 Ames, Equity Jurisdiction Cases, p. 644.

³⁹ *Reed v. Holliday*, 19 Fed. 325.

⁴⁰ *Baily v. Taylor*, 1 Russ. & M. 73 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 654.

and the court will refuse to protect his rights from infringement.⁴¹

Apart from any copyright statutes, the author of an unpublished literary work has the right to restrain by injunction the piracy of the result of his intellectual labor. This right extends to the unauthorized publication of an unpublished manuscript,⁴² or of lectures which have been delivered but not published;⁴³ the performance of an unpublished play;⁴⁴ and the unauthorized publication of private letters, whether they have or have not any value as literary productions.⁴⁵ An artist also may prevent the making of copies of his paintings or other works of art.⁴⁶

57. Trademarks—Unfair competition.—A, the owner of a trademark, suffers damage by its unauthorized use on the goods of a rival, B, so that persons are deluded into buying B's goods under the belief that they are the goods of A; the amount of custom which A loses by this fraudulent competition is, obviously, a difficult thing to estimate, so that A's right to an injunction is undoubted.⁴⁷ The jurisdiction in recent years has been extended far beyond the protection of technical trademarks. Thus, the

⁴¹ *Martinetti v. Maguire*, 1 Deady 216 (U. S.); *Egbert v. Greenberg*, 100 Fed. 447 ("official form chart of races" not an immoral publication).

⁴² *Palmer v. DeWitt*, 47 N. Y. 532, 7 Am. Rep. 480.

⁴³ *Nicols v. Pitman*, L. R. 26 Ch. D. 374 (Eng.).

⁴⁴ *Tompkins v. Halleck*, 133 Mass. 32, 43 Am. Rep. 480.

⁴⁵ *Gee v. Pritchard*, 2 Swans. 402 (Eng.), 1 Scott, Cases on Equity, p. 149, 1 Keener, Equity Jurisdiction Cases, p. 59.

⁴⁶ *Prince Albert v. Strange*, 1 Mac. & G. 25 (Eng.), 1 Hall & T. 1, 2 De G. & S. 652.

⁴⁷ *National Biscuit Co. v. Baker*, 95 Fed. 135; *Vacuum Oil Co. v. Climax Refining Co.*, 120 Fed. 254 (when descriptive words are not a valid trademark).

use of a trade name so similar to that of another as to deceive the public will be enjoined. Cases have even arisen where, on special facts, a man has been prohibited from using his own name in business,⁴⁸ or required to use every reasonable means to distinguish his goods from those of a competitor who was in the business before him.⁴⁹ Further, imitation of the color, form or style of the packages, labels, etc., used by the plaintiff, in such a way as to deceive the public and injure the plaintiff's business, will be enjoined.⁵⁰ The maxim, "He who comes into equity must come with clean hands" applies with great force to all these cases. Consequently, the plaintiff will lose his right to a writ of injunction if in his trademark, trade name, or advertisements he has been guilty of material false statements regarding his article.⁵¹

58. Other torts—Trade libels, strikes, boycotts, etc.—A publication will not be restrained merely because it is libellous;⁵² but the fact that a publication is libellous will not prevent an injunction if there is some other ground for restraining the publication. Thus, where A sent circulars to B's customers, not in good faith but maliciously, threaten-

⁴⁸ Chas. S. Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 43 Am. St. Rep. 769, 27 L. R. A. 42, 39 N. E. 490.

⁴⁹ Royal Baking Powder Co. v. Royal, 122 Fed. 337, 58 C. C. A. 499.

⁵⁰ Denison Mfg. Co. v. Thomas Mfg. Co., 94 Fed. 651.

⁵¹ Worden & Co. v. California Fig Syrup Co., 187 U. S. 516, 23 Sup. Ct. 161, 47 L. Ed. 282.

⁵² Prudential Assur. Co. v. Knott, L. R. 10 Ch. 142, 1 Keener, Equity Jurisdiction Cases, p. 53; Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69, 19 Am. Rep. 310, 1 Keener, Equity Jurisdiction Cases, p. 51. Modern English cases enjoin such publications; but they depend in part on statute: Quartz Hill, etc. Co. v. Beall, L. R. 20 Ch. D. 501, 507 (Eng.).

ing suits for the alleged infringement by B of A's patent, B obtained a writ of injunction restraining A.⁵³

Injunction cases against striking workmen often involve difficult questions of theory in the law of torts: questions as to the propriety of the remedy of injunction are at the present day comparatively rare. It is well settled that actual or threatened violence by strikers to the plaintiff's employees or to persons seeking employment from him is a proper subject for injunction, on the ground that the damage is difficult to estimate, and on the ground of avoiding multiplicity of suits.⁵⁴ The chief criticism of the equity courts in these cases has been, that the acts involved are frequently crimes, and should be left to be punished by the criminal courts, instead of by the equity courts, without a jury, through the summary process of contempt. The general principle is well settled, however, that equity will not refuse to protect a property right by appropriate remedies on the ground that the threatened infringement of that right is also a violation of the criminal law:⁵⁵ while, conversely, it will not interfere to restrain a criminal act where no right of property is involved.⁵⁶

⁵³ *Emack v. Kane*, 34 Fed. 46; see, also, *Casey v. Cincinnati Typographical Union*, 45 Fed. 135, 12 L. R. A. 193 (boycotting circular); 2 *Pomeroy, Equitable Remedies*, § 630.

⁵⁴ *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551 (Eng.), 1 *Scott, Cases on Equity*, p. 763; *Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 57 Am. St. Rep. 443, 35 L. R. A. 722, H. & B. 773; *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 53 Atl. 230, 1 *Scott, Cases on Equity*, p. 768.

⁵⁵ *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 34 L. Ed. 1092.

⁵⁶ *Cope v. District Fair Association*, 99 Ill. 489, 39 Am. Rep. 30, 1 *Ames, Equity Jurisdiction Cases*, p. 29.

59. Injunction against state and municipal officers.—The law on these subjects is treated elsewhere; but a few points may be noted. Equity has no jurisdiction to control elections to office.⁵⁷ The legal remedies are, in general, adequate to test the right to hold a public office.⁵⁸ The unlawful acts of public officers may, however, be restrained, where they would produce irreparable injury, or create a cloud upon title, or involve a multiplicity of suits.⁵⁹ Political acts of public officers will not be restrained.⁶⁰

A very common form of suit is that brought to restrain the enforcement of illegal ordinances, or other illegal or fraudulent acts by municipal officers. The suit is usually brought by one or more taxpayers suing as representatives of the whole body of taxpayers; and the ground of jurisdiction is, that the illegal act, being a diversion of the funds of the municipality to improper uses, will ultimately result in increasing the burden of taxation.⁶¹ Acts frequently enjoined are, the issuing of municipal bonds for purposes unauthorized by law;⁶² incurring municipal indebtedness in excess of the limit prescribed by the state constitution;⁶³ disregard of laws which

⁵⁷ *Fletcher v. Tuttle*, 151 Ill. 41, 42 Am. St. Rep. 220, 25 L. R. A. 143, 37 N. E. 683.

⁵⁸ *Arnold v. Henry*, 155 Mo. 48, 78 Am. St. Rep. 556, 55 S. W. 1089.

⁵⁹ *People v. Canal Board*, 55 N. Y. 390, 1 Keener, Equity Jurisdiction Cases, p. 100.

⁶⁰ *State of Georgia v. Stanton*, 6 Wall. 50 (U. S.), 18 L. Ed. 721.

⁶¹ *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. Ed. 1070; *Russell v. Tate*, 52 Ark. 541, 13 S. W. 130, 20 Am. St. Rep. 193, 7 L. R. A. 180, 1 Pomeroy, Equitable Remedies, § 345.

⁶² *Newmeyer v. Missouri & M. R. Co.*, 52 Mo. 81, 14 Am. Rep. 394.

⁶³ *Honaker v. Board of Education*. 42 W. Va. 170, 24 S. E. 544, 57 Am. St. Rep. 847, 32 L. R. A. 413.

require contracts to be let to the lowest responsible bidder.⁶⁴

60. **Injunction against taxation.**—Illegal taxation is a very common subject for injunctive relief; but the rules on the subject vary so greatly from state to state that few generalizations are possible. If the tax is a lien on real estate, and the tax proceedings are not invalid upon their face, the title is clouded and relief may often be had on this ground.⁶⁵ If the defect or illegality in the tax is one which concerns the whole community so that each tax-payer has the same cause of complaint, then, according to the rule in many states, equity may take jurisdiction for the purpose of avoiding multiplicity of suits.⁶⁶ In perhaps the majority of states, a defect or illegality in a personal property tax, affecting one person only, is rarely the subject of an injunction; since if his chattels are seized for non-payment of the illegal tax, trespass or trover lies against the officers making the seizure.⁶⁷

61. **Injunction against exercise of eminent domain power.**—Constitutions of all states as well as of the United States, contain the provision that "property shall not be taken for public use without just compensation." A violation of this constitutional guaranty by agencies—e. g., railroads—which are vested by the legislature with the power of eminent domain is a wrong of such a serious nature,

⁶⁴ *Adams v. Brennan*, 177 Ill. 194, 52 N. E. 314, 69 Am. St. Rep. 222, 42 L. R. A. 718.

⁶⁵ See § 87.

⁶⁶ See § 85.

⁶⁷ *Shelton v. Platt*, 139 U. S. 595, 11 Sup. Ct. 646, 35 L. Ed. 273.

and the eminent domain power is so liable to abuse, that courts of equity freely enjoin such violation, without inquiring whether the legal remedy of damages is adequate.⁶⁹ Questions of considerable difficulty have arisen where a railroad, other than a street railway, is authorized to occupy a street, and by its operation causes damage to the owners of adjoining property. It is generally agreed that if the ownership of the street is vested in the abutting owner, while the public merely has an easement in the street, such owner may enjoin the use of the street by the railroad until compensation is ascertained or paid.⁷⁰ In cases, however, where the ownership of the street is in the public and not in the abutting owner, there is a sharp conflict of authority as to whether injunction will lie,⁷¹ or the owner will be confined to his action at law for damages.⁷²

62. Injunction in aid of other equitable remedies.—The foregoing paragraphs,⁷³ together with those relating to enjoining breach of contracts,⁷⁴ enumerate the more conspicuous instances in which an injunction may take the place of the legal remedy. In addition, the instances are numberless where an

⁶⁹ *East & West R. Co. of Alabama v. E. T. V. & G. R. Co.*, 75 Ala. 275; *Lewis, Eminent Domain*, § 632; *Pomeroy, 1 Equitable Remedies*, § 465.

⁷⁰ *Williams v. New York C. R. Co.*, 16 N. Y. 97, 69 Am. Dec. 651, 1 Ames, *Equity Jurisdiction Cases*, p. 521, 1 Scott, *Cases on Equity*, p. 706.

⁷¹ See the great series of elevated railroad cases in New York, beginning with *Story v. N. Y. etc. R. R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146; including *Galway v. Metropolitan Elevated R. Co.*, 128 N. Y. 145, 28 N. E. 479, 13 L. R. A. 788, 1 Ames, *Equity Jurisdiction Cases*, p. 601, 1 Keener, *Equity Jurisdiction Cases*, p. 822.

⁷² *Stetson v. Chicago & E. R. Co.*, 75 Ill. 74, 1 Ames, *Equity Jurisdiction Cases*, p. 595.

⁷³ §§ 41 to 61.

⁷⁴ §§ 16, 34, 35.

injunction may be used in connection with other equitable remedies. It may be said that an injunction will be granted in aid of an equitable remedy whenever it is needed to render that remedy effectual.⁷⁵ Thus, if the suit is for cancellation—i. e., to compel a written instrument or contract obtained by fraud to be delivered up for the purpose of being cancelled or destroyed—an injunction may be granted to prevent the transfer of the instrument pending suit.⁷⁶ A beneficiary may restrain a threatened breach of trust by his trustee, as well as call him to account when the breach has been committed.⁷⁷ In general, whenever the litigation in equity concerns specific property—as is usually the case in equity suits—an injunction will be granted, if needed, restraining the defendant from transferring or encumbering the property until the rights of the plaintiff are determined.⁷⁸

63. Injunctions against actions and judgments at law—Equitable defenses.—Suppose that A has made an oral contract to purchase land from B, has gone into possession and paid the price. Under the equity doctrine of part performance, as we have seen,⁷⁹ A has an “equity” for specific performance. B now brings ejectment against A. The court of law knows nothing about the doctrine of part performance, and therefore must give judgment for B. Must A submit to being turned out of possession, notwithstand-

⁷⁵ 4 Pomeroy, Equity Jurisprudence, § 1339.

⁷⁶ See § 65.

⁷⁷ Drake v. Wild, 65 Vt. 611, 27 Atl. 427.

⁷⁸ 4 Pomeroy, Equity Jurisprudence, § 1340.

⁷⁹ See § 29.

ing that the equity court will, in a proper suit, clothe him with the legal title? The court of chancery is not a higher court than that of common law—and cannot reverse its judgment. Situations like this gave rise to many conflicts of jurisdiction between the two courts in early days, which were finally settled about three centuries ago. The machinery adopted is this: the chancery court fully recognizes, and does not attempt to interfere with, the jurisdiction of the common law court. Therefore, chancery addresses its injunction to the litigant party, B, and orders him to desist from his action at law, until A has had a chance to establish his equitable right in the court of chancery; or if B's suit has proceeded to judgment, it prohibits B from making any use of his judgment. In this somewhat roundabout way a defendant in an action at law is enabled to take advantage of any equitable defense that he may have. In the code states, i. e., those states which,⁸⁰ following the example of New York, have effected a partial blending of law and equity, the defendant is allowed to set up in the action at law any defenses, whether legal or equitable, thus saving the expense and trouble of two suits. Injunction for the purpose of setting up equitable defenses, therefore, is nearly obsolete in those states.⁸¹

64. Same subject—Judgments obtained by fraud or accident.—A defendant may have a good legal defense to the action at law, and yet, without any fault or negligence on the part of himself or his at-

⁸⁰ See § 34.

⁸¹ 4 Pomeroy, Equity Jurisprudence, §§ 1366 and following.

orney, may be prevented from setting it up. Thus, the party may rely on the fraudulent promise of the plaintiff that the case against him will not be pressed, or that it will not be brought to trial, and so suffer judgment by default. The party who obtains a judgment in this or any other way by fraud will be enjoined from making use of his judgment.⁸² Unavoidable accident is another ground for relief against judgments: as where the defendant's attorney was prevented from attending the trial by a sudden flood.⁸³ These are merely examples from a long list of instances in which it is deemed unconscientious for the plaintiff at law to take the benefit of his judgment.⁸⁴ In many of these cases modern statutes give the defendant legal relief by motion for a new trial; but the jurisdiction of equity still remains.

There is, however, one important and striking exception. Where the plaintiff at law has obtained his judgment by perjured testimony, it might be supposed that a court of conscience would be ready and eager to give relief against the judgment. But other considerations here come into play. The credibility of the plaintiff's witnesses was one of the things to be determined in the first suit. Moreover, to admit perjury as a ground for a new trial would lead, it is thought, to endless litigation of the same issues. It is human nature for a defeated litigant to believe that he lost his case by the perjury of his opponent.

⁸² *Merriman v. Walton*, 105 Cal. 403, 45 Am. St. Rep. 50, 30 L. R. A. 786, 8 Pac. 1108.

⁸³ *Ford v. Ford*, 1 Miss. 505, 12 Am. Dec. 587. For further examples, see *Pomeroy, Equitable Remedies*, § 658.

⁸⁴ 2 *Pomeroy, Equitable Remedies*, §§ 647-669.

For these reasons of policy, the majority of the courts refuse to enjoin a judgment on the ground of perjury alone.⁸⁵

⁸⁵ United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93; Pico v. Cohn, 91 Ca¹ 129, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336; 2 Pomeroy, Equitable Remedies, § 656.

NOTE.

Legislation by Congress of the type of The Clayton Act, The Norris-La Guardia Act, The Taft-Hartley Act, etc., as well as similar legislation by the states to impair the jurisdiction of the equity courts in the field of labor disputes, have not done away with the injunction in handling such disputes. The fundamental reasons for calling upon equity for relief by way of injunction have not been disturbed. Fraud, violence, destruction of property, etc., are still adequate and potent grounds on which to invoke equity jurisdiction, the same as they always have been.

CHAPTER IV.

CANCELLATION—REFORMATION—RESCISSION.

65. **Cancellation of instruments.**—This is a remedy by which an invalid written instrument is ordered to be delivered up to be destroyed or cancelled. As alternative or additional relief, the holder of the instrument may be enjoined from bringing suit upon it. Deferring for future consideration cases where the instrument creates a cloud upon title to land,⁸⁶ the question in each case usually is, Will complainant have an adequate remedy by defending such action at law as the holder of the instrument may bring? If the defense is one of which courts of equity alone take cognizance, he, of course, has no remedy at law, and cancellation will lie. If the defense is a legal one, and appears upon the face of the instrument—for example, if the instrument is a contract reciting an illegal consideration,—then the complainant is in no real danger from a future suit upon the instrument; his defense at law is simple and complete.⁸⁷

Suppose the instrument to which there is a valid defense, not apparent on its face, is negotiable. B obtains from A, by fraud, A's promissory note, payable July 1st. In B's suit against A on the note, A may successfully set up the defense. But it is the

⁸⁶ See §§ 87-89.

⁸⁷ *Simpson v. Lord Howden*, 3 My. & Cr. 97 (Eng.), 2 Ames, *Equity Jurisdiction Cases*, p. 124.

peculiarity of negotiable paper, that if B, before July 1st, transfers the note to C, a bona fide purchaser for value, C will take it free from the defense; in C's suit on the note, A may not set up the defense that would have availed against B. A, therefore, needs, and may obtain not only a writ of injunction against B's transferring the note, but also on proof of its invalidity, a surrender of the note for cancellation.⁸⁸

66. **Same subject.**—Suppose, however, an ordinary written contract is subject to some legal defense, such as fraud, not apparent upon its face. B obtains an insurance policy from the insurer, A, by material false representations. A's proof of the fraud depends upon the oral testimony of witnesses who, years hence, when A sees fit to bring suit upon the policy, may be scattered, or may be dead, or may have forgotten all about the transaction. Unless B, by a suit to cancel the instrument, can litigate its validity now, he may at some future time be subjected to an unjust recovery on account of the loss of the evidence to prove his defense. Is this a sufficient ground for cancellation? On this question the American cases are in the sharpest conflict.⁸⁹ Probably the rule of the majority is that this danger of loss of evidence is not, alone, a sufficient ground for cancellation. This conclusion depends, in part, on the reason that modern statutes provide for the per-

⁸⁸ *Smith v. Aykwell*, 3 Atk. 566 (Eng.), 2 Ames, Equity Jurisdiction Cases, p. 132.

⁸⁹ *Fuller v. Percival*, 126 Mass. 381, 2 Ames, Equity Jurisdiction Cases, p. 111, 3 Keener, Equity Jurisdiction Cases, p. 483; *Andrews v. Frierson*, 134 Ala. 626, 33 South. 6, 1 Scott, Cases on Equity, p. 108.

petuation of the testimony of witnesses to be used on a future trial.⁹⁰

67. Reformation — Mutual mistake.—Reformation is an equitable remedy by which a written agreement is corrected so as to express what the parties intended it to express. A contracts to convey to B, a tract of land, Whiteacre. By mistake, not noticed by either A or B, the land conveyed is so described in the deed that Blackacre is included. The legal title to Blackacre, of course, passes to B on delivery of the deed. The mistake of the parties is *mutual*; that is, each party is ignorant of the same fact, viz., that Blackacre is included in the conveyance. B holds the legal title to Blackacre, under the deed, impressed with an equity in A's favor. In this particular instance, something more than a correction of the instrument is needed: B must be ordered to reconvey Blackacre to A. In many states, however, under modern statutes,⁹¹ the decree of reformation will have the effect of a conveyance.

Reformation, then, is appropriate, where by mutual mistake of the parties a written instrument fails to express or effect the real agreement actually made by the parties.⁹²

68. Same subject—Mistake of one party, known to the other.—If B, in the case just put, having contracted for Whiteacre, notices, before he accepts the conveyance, that Blackacre is included in the deed,

⁹⁰ *Globe Mut. L. Ins. Co. v. Reals*, 79 N. Y. 202, 3 Keener, *Equity Jurisdiction Cases*, p. 485; *Allerton v. Belden*, 49 N. Y. 373, 2 Ames, *Equity Jurisdiction Cases*, p. 113; *Insurance Co. v. Bailey*, 13 Wall. 616 (U. S.), 20 L. Ed. 501, 3 Keener, *Equity Jurisdiction Cases*, p. 474.

⁹¹ See § 10.

⁹² *Pomeroy*, *Equity Jurisprudence*, §§ 870, 1376.

his act in accepting the deed is not mistaken, but dishonest and fraudulent. His conduct is at least as blameworthy as if he had accepted the deed in ignorance of the mistake and then resisted A's demand for a reformation. A mistake of one party, known to the other, whereby the instrument does not conform to the agreement, is, therefore, as good a ground for reformation as a mutual mistake.⁹³

69. **When there can be no reformation.**—The purpose of reformation, it will be observed, is to make the written expression of the contract conform to the contract. Courts of equity do not undertake to change or make the contracts of parties. Suppose, for example, that A intends to offer Whiteacre to B; B honestly believes that Blackacre is included in the offer, and fixes the price on that supposition; so that there is no true meeting of the minds—no contract. B draws up the deed, including Blackacre, and A signs and delivers the deed without observing that by its terms Blackacre passes. Here is a double mistake, to be sure—a mistake by A as to the contents of the deed, a mistake by B as to the terms of the contract; but no *mutual* mistake. A cannot have the deed reformed to correspond to his intention, because B made no such contract. The case may be one for rescission, but not for reformation.⁹⁴ Take another case: A, a widow, is about to marry B. They wish to settle A's property upon her so

⁹³ *Keister v. Myers*, 115 Ind. 312, 17 N. E. 161, 3 Keener, Equity Jurisdiction Cases, p. 314; *Cleghorn v. Zumwalt*, 83 Cal. 155, 23 Pac. 294, 2 Ames, Equity Jurisdiction Cases, p. 197, 3 Keener, Equity Jurisdiction Cases, p. 322, LEADING ILLUSTRATIVE CASES.

⁹⁴ *Page v. Higgins*, 150 Mass. 27, 22 N. E. 63, 5 L. R. A. 152, 2 Ames, Equity Jurisdiction Cases, p. 188.

that B, after marriage, cannot touch it. A has a large income under a settlement by a former husband. Both A and B believe that the terms of this former settlement are such that it will apply to the second marriage, and therefore refrain from including it in the present settlement. After the marriage and separation of A and B, A, having discovered the mistake, seeks to have the second settlement reformed so as to include the omitted income. Her suit must fail; equity will not make a contract for A and B which they failed to make, merely because, if they had known all these facts at the outset, they would have entered into a different contract.⁹⁵

Again, the instrument may intentionally vary from the contract made. A agreed to give B a warranty deed on the exchange of certain premises. The effect of the warranty deed, of course, would be to make A personally responsible if the premises should turn out to be subject to an incumbrance. Later, A declined to make anything but a quitclaim deed, which B accepted. Both parties were ignorant that the premises were incumbered. Held, that B could not have the deed reformed so as to include a warranty. By accepting the quitclaim he deliberately varied the contract to his disadvantage, and took the chance of loss.⁹⁶

70. Rescission—When, for mutual mistake.—A sold to B a piece of land located on a stream, both

⁹⁵ *Barrow v. Barrow*, 18 Beav. 529 (Eng.), 2 Ames, Equity Jurisdiction Cases, p. 199, LEADING ILLUSTRATIVE CASES.

⁹⁶ *Whittemore v. Farrington*, 76 N. Y. 452, 2 Ames, Equity Jurisdiction Cases, p. 208, 3 Keener, Equity Jurisdiction Cases, p. 207, 2 Scott, Cases on Equity, p. 600.

parties being ignorant that the land had been swept away by a flood. B gives A his bond for the price. Since a bond is an instrument under seal the failure of the consideration could not be set up in A's action on the bond. Can B have relief in equity? Here we have a mutual mistake as to the *existence of the subject matter* of the contract; equity will order the contract rescinded, the bond cancelled, and any payment made by B returned.⁹⁷

In the first case put in § 69, the deed was made under the mutual belief that a contract of sale existed, when in reality no contract had been made. The case, therefore, is one for rescission, and cancellation of the deed.⁹⁸

A, having a claim against the government of Spain, contracted to pay B, a lawyer, a percentage of the amount to be recovered, in consideration of B's services in prosecuting the claim. Both parties were ignorant that the claim had been allowed. Here we have rescission, on the ground that the parties were ignorant of a matter which was present in their minds as a material inducement to the contract. The agreement was made on the assumption that the claim had not been allowed.⁹⁹

71. No rescission for mutual mistake as to value.—A sold to B a promissory note made by C. Both A and B were unaware at the time that C had gone

⁹⁷ Case put in *Hitchcock v. Giddings*, 4 Price 135 (Eng.), 2 Ames, *Equity Jurisdiction Cases*, p. 192.

⁹⁸ *Page v. Higgins*, 150 Mass. 27, 22 N. E. 63, 5 L. R. A. 152, 2 Ames, *Equity Jurisdiction Cases*, p. 188.

⁹⁹ *Allen v. Hammond*, 11 Pet. 63 (U. S.), 9 L. Ed. 633, 2 Scott, *Cases on Equity*, p. 582.

into bankruptcy, and therefore would be unable to pay his debts in full. B has no right to a rescission of the sale; the mistake was merely as to the value of the article sold, not as to its existence or identity.¹ The policy of the rule is obvious; if a party were permitted to avoid his contracts because of a mistake as to the value of the subject matter, few transactions would stand.

72. Unilateral mistake—Generally, no rescission or reformation.—A offers to sell to B for \$1,000 a tract of land, so described by metes and bounds as to include both Whiteacre and Blackacre. A intends to sell Whiteacre only, and supposes that the description accurately expresses his intent. B accepts the offer in good faith, in ignorance of A's mistake, and taking the offer to be what it appears to be on its face. May A have any relief? May he have the contract reformed,—e. g., by omitting Blackacre? Obviously not, since that would be to force upon B a contract that B never made. May he have rescission, and so avoid the contract altogether? The contract contains the elements of a good offer and acceptance; to permit rescission because of facts present in the mind of one party only would render the avoidance of contracts too easy a matter. Unilateral mistake, as a general rule, is no ground for rescission or reformation. A, in fact, may not even resist specific performance of the contract made,² except

¹ *Hecht v. Batcheller*, 147 Mass. 335, 17 N. E. 651, 9 Am. St. Rep. 708, 2 Ames, Equity Jurisdiction Cases, p. 212.

² *Tamplin v. James*, L. R. 15 Ch. Div. 215 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 388, 2 Keener, Equity Jurisdiction Cases, p. 979, 2 Scott, Cases on Equity, p. 277.

in a few cases where the hardship on A would be very great.³

73. Unilateral mistake, known to other party, in making contract.—A offers in writing to rent a house to B for \$30 a month. A intended his offer to be \$50; the wrong figure was inserted by a slip of the pen. B accepts the offer as made, realizing that it was made by mistake. May A have his contract reformed, and force B to take the house at \$50? Plainly not, for B never consented to any such terms. Equity will not make a contract for the parties.⁴ A, however, may, as we have seen,⁵ defend B's suit for specific performance; and there is good authority for holding that A may have the contract rescinded on account of B's fraud in accepting an offer which he knew to be mistaken.⁶

74. Mistake in gifts.—Thus far we have been dealing with the mistake of one or both parties to a contract. Mistakes on the part of a donor are governed by a different set of rules. If A intends to make a gift of Blackacre to B, and by mistake includes Whiteacre in the conveyance; or if A intends to make a gift of a life estate to B and by mistake conveys a fee, B, being a mere volunteer, a recipient of A's bounty, has no equity to retain what A did not intend to give. The fact that he may have ex-

³ *Malins v. Freeman*, 2 Keen 25 (Eng.), 1 Ames, *Equity Jurisdiction Cases*, p. 383, 2 Keener, *Equity Jurisdiction Cases*, p. 933, 2 Scott, *Cases on Equity*, p. 272.

⁴ *Gun v. McCarthy*, 13 L. R. Ir. 304 (Ireland), 2 Ames, *Equity Jurisdiction Cases*, p. 238. Compare § 68, when the unilateral mistake was in reducing the contract to writing.

⁵ See § 21.

⁶ *Gun v. McCarthy*, note 4 above.

pected to receive more than A intended to give does not, in justice, entitle him to take advantage of A's mistake. A, therefore, may have reformation, so as to make the conveyance correspond with his intention; or a reconveyance from B of the excess over what A intended to give.⁷

75. Same subject.—Suppose that the situation in the last paragraph is reversed. A, intending to give Whiteacre and Blackacre to B, by mistake conveys Whiteacre; or intending to give B a fee, by mistake conveys only a life estate. May B compel A, against his will, to make a conveyance in accordance with his original intention? It was pointed out that A's mere promise to make a gift to B can not be specifically enforced by B. No more will equity aid a volunteer by compelling reformation of a defective or imperfect gift.⁸

If A is dead, however, and B's suit is against his heirs, the situation is different. B and the heirs are equally volunteers. If B can show that the gift did not carry out A's intention, and there is no reason to suppose that A's intention, up to the time of his death, had changed, so that if B had applied to A in the latter's lifetime the mistake would have been rectified, B's claim to reformation would appear to be stronger than the claim of the heirs to resist it; and such is the better view.⁹

76. Mistake of law.—If any proposition can be considered established by innumerable dicta, the

⁷ *Andrews v. Andrews*, 12 Ind. 348, 2 Ames, Equity Jurisdiction Cases, p. 245.

⁸ *Eaton v. Eaton*, 15 Wis. 259, 2 Ames, Equity Jurisdiction Cases, p. 244.

⁹ *MacMechan v. Warburton*, L. R. Ir. 1 Ch. D. 435.

rule that mistake of law cannot be relieved against would seem to be so established. But on examination we find that well established exceptions to the rule cover nearly as much ground as the rule itself. *Ignorantia juris non excusat*,—"Ignorance of the law is no excuse," is an ancient maxim of the common law. It finds its justification in considerations of policy—the necessity of certainty as to the binding force of contracts, and of the finality in litigation. If a party to a contract or to a law suit were at liberty to avoid his contract or set aside a judgment because of his or his attorney's ignorance of law, great confusion, it is believed, would result.¹⁰ It is therefore settled, with but little dissent, that a mistake of one or both parties as to the legal effect of a contract will not, by itself, be a ground for rescinding the contract in equity;¹¹ and under the rules as to reformation already stated, it will not be a ground for reforming the contract, since equity does not undertake to make contracts for the parties.¹²

77. Same subject—Reformation where instrument does not express the contract.—It is equally well settled that when the parties have made a definite agreement, and in reducing it to writing have employed language the legal significance of which does not express their intention, the contract may be reformed by substituting the proper phraseology.

¹⁰ 2 Pomeroy, Equity Jurisprudence, § 842.

¹¹ 2 Pomeroy, Equity Jurisprudence, § 843, and cases cited.

¹² Hunt v. Rousmaniere, 8 Wheat. 174 (U. S.), 1 Pet. 1 (U. S.), H. & B. 177, 183, 2 Ames, Equity Jurisdiction Cases, p. 250, 3 Keener, Equity Jurisdiction Cases, p. 6, 2 Scott, Cases on Equity, p. 544.

Thus, in a leading case, the parties to a deed reserved a "dower" interest in the estate conveyed,—a life estate in one third—when it was their intention and agreement to reserve the remainder as well as the life estate; a reconveyance of the remainder was decreed, so that their intention was carried out.¹³ The analogy to cases where reformation for mistake of fact is allowed, is plain;¹⁴ so that we may generalize and say that reformation is appropriate when by mistake either of law or fact the instrument does not express the contract actually made.

78. Same subject—Inequitable conduct of other party.—Secondly, if the mistake of law of one party is known to and taken advantage of by the other; and in general, if the one party's mistake is accompanied by misrepresentations, breach of confidence, undue influence, or other inequitable conduct on the part of the other, the transaction resulting from the mistake may be rescinded.¹⁵ Here again, the situation is analogous to that of unilateral mistake of fact known to the other party.¹⁶

79. Same subject—Mistake as to party's existing rights.—A party may be perfectly aware of the legal meaning and effect of the contract which he enters into and yet his contract may be the result of a mistake as to his existing rights. Thus, he may con-

¹³ *Canedy v. Marey*, 13 Gray 373 (Mass.), 2 Ames, *Equity Jurisdiction Cases*, p. 256, 3 Keener, *Equity Jurisdiction Cases*, p. 35, 2 Scott, *Cases on Equity*, p. 552. For further cases, see 2 Pomeroy, *Equity Jurisprudence*, § 845.

¹⁴ Compare § 67.

¹⁵ *Haviland v. Willetts*, 141 N. Y. 35, 35 N. E. 958, 2 Ames, *Equity Jurisdiction Cases*, p. 273, 3 Keener, *Equity Jurisdiction Cases*, p. 144.

¹⁶ See § 73.

tract to pay a rental for Whiteacre, whereas if he had put the correct legal interpretation upon the instruments which form the chain of title to Whiteacre he would have discovered that he is himself the owner of Whiteacre. There are a number of cases of considerable antiquity which give equitable relief under similar circumstances.¹⁷ These authorities have been followed in England in the last fifty years, and to an increasing extent in this country. It is pointed out that "ownership" is a complex conception; that a mistake as to ownership, though due to a misapprehension or misapplication of rules of law, may, after all, well be viewed as essentially a mistake concerning a fact.¹⁸

80. Same subject—Compromises.—To the last rule there is a clearly marked exception. If the parties, with equal opportunities of ascertaining their rights, enter into a contract which is intended as a compromise of their rights, this compromise will not be set aside because of mistake. Each party deliberately takes a chance that he may be mistaken, and that chance enters into his computations in fixing the terms of the compromise. The present rule assumes that the parties deal upon an equal basis;

¹⁷ *Turner v. Turner*, 2 Ch. Rep. 154 (Eng.), 2 Ames, Equity Jurisdiction Cases, p. 263; *Bingham v. Bingham*, 1 Ves. Sr. 126 (Eng.), 2 Ames, Equity Jurisdiction Cases, p. 264, 3 Keener, Equity Jurisdiction Cases, p. 5, 2 Scott, Cases on Equity, p. 543; *Pusey v. Desbouvrie*, 3 P. Wms. 315. 320 (Eng.), 3 Keener, Equity Jurisdiction Cases, p. 2, 1 Scott, Cases on Equity, p. 430.

¹⁸ 2 Pomeroy, Equity Jurisprudence, § 849; *Cooper v. Phibbs*, L. R. 2 H. L. 149 (Eng.), 2 Ames, Equity Jurisdiction Cases, p. 266, 3 Keener, Equity Jurisdiction Cases, p. 43, 2 Scott, Cases on Equity, p. 559; *Blakeman v. Blakeman*, 39 Conn. 320, 3 Keener, Equity Jurisdiction Cases, p. 42, 2 Scott, Cases on Equity, p. 569; *Renard v. Clink*, 91 Mich. 1, 51 N. W. 692, 30 Am. St. Rep. 458, H. & B. 212, LEADING ILLUSTRATIVE CASES.

if the compromise is brought about by misrepresentation, concealment, breach of confidence reposed, or other inequitable conduct, it may be set aside.¹⁹

81. **Same subject—Mistake of law in gifts.**—A intends to make a gift of a life estate in land to B, and remainder to B's children. By a very common mistake in legal phraseology, language in the conveyance which the layman would suppose to express this intent clearly, has the legal effect of vesting the whole estate in B. If the mistake by which this result is reached had been one of fact, either A or B's children, as we have seen, might have the deed reformed.²⁰ Where A's mistake is one of law, there appears to be no reason in natural justice or in policy, why B, a mere recipient of A's bounty, should be allowed to profit by A's mistake, and defeat his plain intention. The better rule appears to be, therefore, that a mistake of law in a gift stands on the same ground, as respects reformation, as a mistake of fact.²¹

¹⁹ 2 Pomeroy, Equity Jurisprudence, § 850; Hall v. Wheeler, 37 Minn. 522, 35 N. W. 377, 2 Ames, Equity Jurisdiction Cases, p. 288, 3 Keener, Equity Jurisdiction Cases, p. 99.

²⁰ See § § 74, 75.

²¹ Wyche v. Greene, 16 Ga. 49, 2 Ames, Equity Jurisdiction Cases, p. 289; *contra*, Fowler v. Black, 136 Ill. 363, 26 N. E. 596, 2 Ames, Equity Jurisdiction Cases, p. 293, 3 Keener, Equity Jurisdiction Cases, p. 100, 2 Scott, Cases on Equity, p. 555.

CHAPTER V.

BILLS OF PEACE—CLOUD ON TITLE—PARTITION.

82. **Bills of peace—Jurisdiction to avoid a multiplicity of suits.**—We have seen, in discussing the subject of injunction against trespass and nuisance, that a frequent ground of equity jurisdiction is the desire to avoid a multiplicity of suits,—viz.: repeated actions at law by plaintiff against the same defendant.²² To avoid the vexation and expense of the numerous suits, equity orders the defendant to discontinue the acts which will give rise to the suits. We now have to consider the situation when the numerous similar suits at law are occasioned by the fact that there are numerous parties. First, take the case where a person would be compelled to become plaintiff or defendant in actions at law between himself and numerous other persons, each action involving precisely the same question.

Suppose, for example, that numerous persons, P, Q, R, S, T, etc., have recovered judgments against B, and each levies execution on A's personal property on the claim that it really belongs to B. Now, as we have seen, the remedy of A at law against any one of these persons, as P, for his trespass on A's personal property, is considered adequate.²³ A, at law, on proving his title to the property, may

²² See §§ 43, 47.

²³ See § 46.

recover either the chattel or damages for its detention or conversion. But A's success in his suit against P will not aid him in his suit against Q, R, S, and the others; since a judgment in a suit to which Q was not a party is not binding on Q. A, therefore, in these different suits has to prove one and only one thing, viz.: his title to the property levied on. It would be a great advantage to A, and no detriment to the others, if this question of A's title could be settled once and for all. The common law, under its rule as to joinder of parties, is unable to do this. Equity, therefore, takes jurisdiction, enjoins proceedings under the executions temporarily, tries in one issue the question whether the property levied upon belongs to A or to B; and if it is found to belong to A, makes the injunction permanent against P, Q, etc.; or if it is found to belong to B, after all, dissolves the temporary injunction and allows the executions to go on.²⁴

83. **Same subject—Other illustrations.**—Plaintiff claimed a right to overflow by means of its dam the lands belonging to numerous defendants. Each defendant was suing or threatening to sue the plaintiff at law for damages. To each of these suits the plaintiff had the same defense, viz.: a right to maintain the dam under a dedication by defendants' predecessor in title. If the dispute had been between the plaintiff and a single land-owner, there would be no ground for equity jurisdiction, since the validity of the defense could then be perfectly

²⁴ *Smith v. Dobbins*, 87 Ga. 303, 13 S. E. 496; *Pollock v. Okolona Sav. Inst.*, 61 Miss. 293.

well determined in a single action for damages. But to save the plaintiff the vexation of setting up the same defense to numerous suits, equity takes jurisdiction of the question, enjoins the numerous suits, and determines once for all whether or not the plaintiff's claim is valid.²⁵ Similarly, trespasses by numerous defendants may sometimes be enjoined, in cases where there is a common question between the plaintiff and each trespasser, though the trespass of any one defendant, considered by itself is not of a serious enough character to warrant an injunction.²⁶

Sometimes the principle of avoiding a multiplicity of suits gives rise to a remedy other than injunction. Thus, as has been noted, in many states a party cannot have a non-negotiable instrument, to which he has a legal defense, cancelled, but must await a suit at law upon the instrument. But, suppose the officers of a city or other corporation have issued bonds, which have come into the hands of several hundred persons, and the corporation claims to have the defense that the bonds were issued without proper authority; this defense may be established by a single suit for cancellation of the bonds.²⁷ In an early case, a suit in equity was maintained for the recovery of certain slaves in which plaintiff claimed an interest as remainder-man. The slaves were in possession of numerous parties. To avoid separate actions at law against these parties, the

²⁵ *City of Albert Lea v. Nielsen*, 83 Minn. 246, 86 N. W. 83.

²⁶ *Smith v. Bivens*, 56 Fed. 352, 2 Ames, *Equity Jurisdiction Cases*, p. 62.

²⁷ *Town of Springport v. Teutonia Sav. Bank*, 75 N. Y. 397; *Louisville, N. A. & C. R. Co. v. Ohio Val., etc., Co.*, 57 Fed. 42.

single bill in equity was entertained to establish the plaintiff's right.²⁸

84. Same subject—Numerous plaintiffs.—On principle, and the weight of authority, jurisdiction may also be taken in equity where numerous persons would have a cause of action at law, involving the same question, against a single defendant. Thus, certain commissioners were about to open a channel to the sea from a pond in which the numerous plaintiffs held fishing rights. If but one person were injured by the act of the defendants, the damages would not be serious enough to warrant an injunction; but to avoid numerous suits for damages by the plaintiffs, an injunction against the defendant's acts was awarded.²⁹ The city of Chicago passed an ordinance, alleged to be invalid, imposing a license fee on all vehicles, including bicycles. To avoid arrest and prosecution, each owner must pay the fee, and then bring suit to recover it back; such suits would be very numerous. To avoid this enormous mass of litigation, equity enjoins the enforcement of the ordinance and passes on the question of its validity at the suit of a group of owners who acted as representatives of the rest.³⁰

85. Same subject—Further illustrations.—A tax is often wholly invalid—void as to every tax-payer; for example, where the tax assessors unlawfully omit a large amount of property, thereby raising the tax

²⁸ *Vann v. Hargett*, 22 N. C. 31, 32 Am. Dec. 689. For pecuniary relief against numerous defendants, see *Bailey v. Tillinghast*, 99 Fed. 801.

²⁹ *Smith v. Smith*, 148 Mass. 1, 18 N. E. 595, 2 Ames, Equity Jurisdiction Cases, p. 64.

³⁰ *City of Chicago v. Collins*, 175 Ill. 445, 51 N. E. 907, 2 Ames, Equity Jurisdiction Cases, p. 92.

rate. Each tax-payer has his legal remedy, by paying the tax under protest and then suing to recover it back. To avoid the inconvenience of this multiplicity of suits, many states allow a representative tax-payer to bring an injunction suit to test the validity of the tax.³¹ In other states it is not considered sound policy to interfere with the collection of the public revenues by injunction on this ground.³² The A. Co. issued certificates to seventy-nine different persons; it was the duty of B to pass upon and approve the securities deposited by the A. Co. with B for securing the payment of the certificates. B neglected his duty and accepted securities that were nearly worthless. A. Co. became insolvent. The sole question between the seventy-nine certificate holders and B was whether B was negligent. They were, therefore, allowed to unite in a suit in equity to establish B's negligence and recover damages from B, instead of bringing seventy-nine separate suits at law.³³

86. Same subject—Limitation on the principle.—Contrast the last case with that where a number of persons are injured in a railroad accident. May they join in a bill in equity to recover damages for the mere reason that each plaintiff's claim presents the common question of the railroad's negligence? On the authorities, the answer must be in the nega-

³¹ *Greedup v. Franklin County*, 30 Ark. 101; *McTwiggan v. Hunter*, 18 R. I. 776, 30 Atl. 962, 2 Ames, *Equity Jurisdiction Cases*, p. 71; *Williams v. County Court*, 26 W. Va. 488, 53 Am. Rep. 94.

³² *Dodd v. Hartford*, 25 Conn. 232, 2 Ames, *Equity Jurisdiction Cases*, p. 69.

³³ *Smith v. Bank of New England*, 69 N. H. 254, 45 Atl. 1082, 2 Ames, *Equity Jurisdiction Cases*, p. 79. LEADING ILLUSTRATIVE CASES.

five. The common question is not necessarily the only question in each suit. Against A, the company may have the defense that he was guilty of contributory negligence; against B, that he was riding on a pass. Each suit, moreover, presents a distinct issue as to the amount of damages, which will vary greatly with each plaintiff, and must be estimated by a jury; while in the case in the last paragraph there is no issue as to damages; but, on proof of the defendant's negligence the amount of damages to each plaintiff was a mere matter of arithmetical computation. Jurisdiction will not be taken to avoid a multiplicity of suits where the multiplicity cannot be avoided; where, after joining all the parties in a comprehensive bill in equity, there still remain separate issues to be tried.³⁴

Thus, the plaintiff brought his bill to cancel numerous notes purporting to be made by him and claimed by him to be forgeries; the notes being in the hands of several defendants. Obviously, proof that note A was forged does not establish that note B is forged. There is a distinct and separate issue of fact as to the forgery of each note; and these issues must remain distinct and separate, though they be all included in one bill in equity. Equity, therefore, by taking jurisdiction would not avoid in substance a multiplicity of suits; therefore it declined jurisdiction.³⁵

³⁴ See cases cited in 1 Pomeroy, *Equity Jurisprudence* (3d ed.), § 251½.

³⁵ *Scott v. McFarland*, 70 Fed. 280: see, also, *Hale v. Allinson*, 188 U. S. 56, 23 Sup. Ct. 244, 250-54; *Tompkins v. Craig*, 93 Fed. 885, 2 Ames, *Equity Jurisdiction Cases*, p. 87.

This is hardly the place to discuss the minority cases which deny the

87. Cloud on title.—A cloud on title is a written instrument which may be used vexatiously or injuriously against the owner of land, or may cast suspicion upon the validity of his title so as to render his land unsaleable at its full value. Thus, suppose A has good title to Blackacre by adverse possession. B holds a deed made to him by C, who was formerly the undisputed owner of the land. To any ejectment that B may bring against A, the Statute of Limitations and proof of A's adverse possession for a sufficient length of time will be a good defense. A, however, cannot compel B to bring ejectment, and has no legal remedy against B. Meanwhile, so long as B's deed is in existence no one will care to purchase Blackacre for its full value; for as the defense to B's ejectment rests in oral proof of A's possession, such purchaser might have some difficulty, at a future time, in making out his defense satisfactorily. Equity, therefore, permits A to bring suit to remove the cloud upon his title; that is, it requires B to deliver up his deed to be cancelled.³⁶

Equity will by injunction prevent the creation of a cloud as freely as it will remove a cloud that has already been created.³⁷

88. Same subject—Plaintiff's possession.—The principle that the relief will be denied if the plaintiff's remedy at law is adequate has its application to this remedy. If the defendant is in possession, the principle of avoiding multiplicity of suits as an independent ground of equity jurisdiction. See 1 Pomeroy, *Equity Jurisprudence* (3d ed.), §§ 264-267, and notes.

³⁶ *Arrington v. Liscom*, 34 Cal. 365, 94 Am. Dec. 722, 2 Ames, *Equity Jurisdiction Cases*, p. 140.

³⁷ See 4 Pomeroy, *Equity Jurisprudence* (3d ed.), § 1398.

remedy of ejectment is open to the plaintiff; he must, therefore, as a general rule, be in possession in order to bring his bill to remove a cloud.³⁸ If the land, however, is vacant and unoccupied, it is assumed to be constructively in possession of the true owner; so that the bill will lie.³⁹ In a few other instances, also, a plaintiff not in possession may maintain the bill, when he is so situated that he cannot eject the party in possession; as, where he is a remainderman.⁴⁰

89. Same subject—Instrument invalid on its face no cloud.—The suit to remove a cloud on title is incumbered with one highly technical requirement; the instrument must not be invalid on its face. If its invalidity appears from a study of the instrument itself—though the defect is discoverable only by the exercise of great legal skill and learning—it is assumed that the purchaser from the owner will not be deterred from buying for a full price by the existence of the instrument uncanceled.

The generally accepted test is this: Would the owner of the property, in an action brought upon the instrument by the holder thereof, be required to offer evidence to defeat a recovery? If he would be, the instrument is a cloud; if not—if such action on the instrument would fall of its own weight—it does not constitute a cloud. Thus, A, the owner of a tract of land, sells and conveys it to B, who records his deed. Later, C, a creditor of A, obtains judgment

³⁸ Keane v. Kyne, 66 Mo. 216, 2 Ames, Equity Jurisdiction Cases, p. 144.

³⁹ O'Brien v. Creitz, 10 Kan. 202, 2 Ames, Equity Jurisdiction Cases, p. 146.

⁴⁰ Hall v. Hooper, 47 Neb. 111.

and execution against A and a sheriff's deed on execution of the tract which formerly belonged to A. Now, if C were to sue B in ejectment and B were to introduce no evidence in defense, C would recover; since C shows title derived from A by the sheriff's deed. To be sure, B could defeat C's ejectment simply by putting the prior record of his deed from A in evidence. This, however, would be matter in defense—a defense that would not appear in C's complaint and proofs. C's claim, therefore, is not invalid on its face; and hence, by the majority view, is a cloud on B's title, which may be removed at B's suit. If C has not yet obtained execution sale or sheriff's deed, but threatens to do so, his proceedings, which if carried out, would create a cloud, may be enjoined.⁴¹

This rule that an instrument invalid on its face is not a cloud has been criticized as highly technical and unjust. However plausible the logic which supports the rule, it certainly results in refusal of relief to persons the value of whose property is as a fact seriously damnified by the invalid claims which the courts, in obedience to the rule, are obliged to pronounce technically harmless. In deference to the criticism the rule has been rejected by a few states; in these states the common sense test is applied: Does the invalid claim in fact prejudice the owner in the full enjoyment of his property rights?⁴²

⁴¹ *Pixley v. Huggins*, 15 Cal. 127, 2 Ames, *Equity Jurisdiction Cases*, p. 153, *LEADING ILLUSTRATIVE CASES*.

⁴² 4 *Pomeroy*, *Equity Jurisprudence* (3d ed.), § 1399; *Day Land & Cattle Co. v. State*, 68 Tex. 527, 4 S. W. 865, 1 Keener, *Equity Jurisdiction Cases*, p. 364.

90. **Statutory suit to quiet title.**—The limitations on the equity jurisdiction have led to the creation by statute in the majority of the states⁴³ of a new form of action, variously known as the “suit to quiet title” or the “suit for the determination of adverse claims.” In about half the states that have adopted this action the plaintiff, as in a suit to remove a cloud, must be in possession; in the others, he may be either in or out of possession. If he is out of possession, so that ejectment would lie, the suit is generally considered legal in its nature, and either party entitled to a jury trial; but if the plaintiff is in possession the suit is equitable. The suit to quiet title, on account of the simplicity of its pleadings and procedure, has in several of the Western states become the usual mode of trying title to land. It is usually held that it will lie though the adverse claim is invalid on its face, and, it seems, even though the claim is a purely oral one, not embodied in a written instrument.⁴⁴

91. **Partition of land.**—Ownership in common or joint ownership of land is attended with a great many inconveniences, so that any system of law needs a legal process by which the land may be divided up among the owners in common and a parcel, proportioned in value to the amount of his interest, assigned to each as absolute owner. The common law remedies for this purpose were restricted in scope and came to be supplanted by the equitable

⁴³ Viz. in the “Code” states and half a dozen others.

⁴⁴ For further description of this important remedy see 2 Pomeroy, *Equitable Remedies*, §§ 739-743.

remedy.⁴⁵ This was largely owing to the comprehensiveness of the equitable rules relating to parties, by which all persons having an estate or interest in the premises, whether owners of a present or of a future interest, might be joined in the suit and bound by the decree.⁴⁶ If the plaintiff's legal title was in dispute, however, the equity court did not pretend to decide the question of title, but awaited the decision of a court of law in the plaintiff's favor;⁴⁷ but this inconvenience has been remedied in many states by statutes permitting the questions of title to be decided in the one equity suit.⁴⁸ In the event that the partition is of equitable estates or interests, the court of equity decides the amount and extent of the interests of the parties and then proceeds to grant partition in one and the same suit.⁴⁹

92. Where partition is inconvenient—Owely of partition.—In general, the plaintiff has an absolute right to partition;⁵⁰ the power of the court of equity to adapt its decree to meet the circumstances of the case enabling it to overcome considerable inconveniences in the way of an exact division. Thus, in one case, perhaps extreme, partition was made of a house by building a wall through the middle of it;⁵¹ and the right to the use of water in a flowing stream may be

⁴⁵ 4 Pomeroy, *Equity Jurisprudence* (3d ed.), § 1386.

⁴⁶ 4 Pomeroy, *Equity Jurisprudence* (3d ed.), § 1387, and cases cited.

⁴⁷ *Frey v. Willoughby*, 63 Fed. 865, 27 U. S. App. 417, 11 C. C. A. 463.

⁴⁸ *Pillow v. Southwest, etc. Co.*, 92 Va. 144, 53 Am. St. Rep. 804, 23 S. E. 32.

⁴⁹ *Aspen M. & S. Co. v. Rucker*, 28 Fed. 220.

⁵⁰ *O'Brien v. Mahoney*, 179 Mass. 200, 88 Am. St. Rep. 371, 60 N. E. 493.

⁵¹ *Turner v. Morgan*, 8 Ves. 143 (Eng.).

partitioned.⁵² It often happens, however, that an exact division is unfair. Thus, to take an imaginary case, suppose that a narrow strip of land to be partitioned, worth \$1,000, between two co-owners, lies two-fifths on one side of a road and three-fifths on the other side. The road constitutes the only fair and reasonable dividing line. The difficulty is met by allotting the two-fifths parcel, worth \$400, to A, and the three-fifths parcel to B, requiring B to pay to A \$100, which may be made a charge or lien upon B's parcel. This compensation to make up for the inequality in value of the parcels, is known as 'conveyance of partition;' it may, in appropriate cases, take the form of a rent charged upon the more valuable parcel, or an easement imposed upon such parcel.⁵³ Again, one of the co-owners may have made improvements upon the land. It is, obviously, unfair that he should be deprived of the benefit of the money he has thus expended. He will, therefore, be awarded compensation by the other cotenants; or the portion of the premises on which he has made the improvements may be set aside to him.⁵⁴

93. Same subject—Partition sale.—The difficulties in the way of an even division of the land often make it desirable that the land be sold and the proceeds divided among the co-owners in proportion to their respective interests. This the court had power

⁵² Warren v. Westbrook Mfg. Co., 88 Me. 58, 51 Am. St. Rep. 372, 35 L. R. A. 388, 33 Atl. 665.

⁵³ 4 Pomeroy, Equity Jurisprudence (3d ed.), § 1389; Updike v. Adams, 24 R. I. 220, 52 Atl. 991, 96 Am. St. Rep. 711.

⁵⁴ Ward v. Ward's Heirs, 40 W. Va. 611, 52 Am. St. Rep. 911, and note, 296, L. R. A. 449, 21 N. E. 746.

to do, but—until statutes came to its aid—only when all the parties in interest who were *sui juris* consented to such a sale. A single adult party, therefore, could defeat a sale and compel a partition by actual division of the property, however inconvenient that mode might be.⁵⁵ This conservative attitude of the courts has been changed in England, and in the United States generally, by statutes which empower the courts to order a sale, without the consent of some of the parties, whenever it appears that a sale is more advantageous for all concerned than a division.⁵⁶

94. Partition of personal property.—The common law afforded no remedy or procedure whatever by which partition of personal property among co-owners thereof could be had. This gave rise to an equity jurisdiction for the purpose, unaffected by statute; the mode, as in partition of land, being a division of the chattels in kind, or where that was not practicable, a judicial sale and division of the proceeds. Partition of personal property is free from the impediments arising from a dispute as to the title. Since no action similar to ejectment lies to try the title to personal property, the court of equity is obliged to try the issue of title itself, if that is disputed, as preliminary to decreeing a partition or sale.⁵⁷

⁵⁵ 4 Pomeroy, Equity Jurisprudence (3d ed.), § 1390; Codman v. Tinkham, 15 Pick. 364 (Mass.).

⁵⁶ Holley v. Glover, 36 S. C. 404, 15 S. E. 605, 31 Am. St. Rep. 883, 16 L. R. A. 776.

⁵⁷ 4 Pomeroy, Equity Jurisprudence (3d ed.), §§ 1391, 1392; Robinson v. Dickey, 143 Ind. 205, 42 N. E. 679, 52 Am. St. Rep. 417.

CHAPTER VI.

SUITS FOR PECUNIARY RELIEF.

95. **Suits for pecuniary relief.**—The remedies which have been discussed so far, apart from the special remedy of injunction, have to do, for the most part, with confirming the title or enjoyment of land or personal property, or avoiding the danger of a future unjust suit. A very large proportion of equitable remedies, however, result in the recovery of a sum of money—pecuniary relief. Of these, again, the majority consist in proceedings taken against certain property resulting in a judicial sale thereof to satisfy the plaintiff's claim. Foreclosure of mortgages and equitable liens—perhaps the commonest of equitable remedies—is more conveniently treated in connection with those topics.⁵⁸ We shall take up here four remedies: Creditors' suits, Exoneration, Contribution, and Accounting.

96. **Creditors' suits.**—Creditors' suits against a living⁵⁹ debtor may be brought for three chief purposes. First, for discovery of assets.⁶⁰ By compelling the debtor to answer under oath interrogatories as to his property the creditor gains information, not otherwise obtainable, to enable him to sub-

⁵⁸ See § 151. For marshalling of securities, see § 159. For subrogation, see §§ 157, 158.

⁵⁹ Creditors' suits against the estates of decedents have, to a great extent, been superseded by provisions of the statutes relating to administration of estates. See § 145.

⁶⁰ As to discovery, see §§ 115, 116.

ject the property to execution.⁶¹ Second, to reach interests of the debtor not subject to execution at law. The common law, knowing nothing of equitable estates and interests, did not permit them to be taken on execution; in addition, many species of intangible property—such as patent rights and copyrights—were not subject to levy and sale. Equity, by a creditor's suit, enables the creditor, where necessary, to have a judicial sale of such property to satisfy his debt. Statutes in England and America have enlarged the scope of the writ of execution, extending it to equitable and other interests; but the jurisdiction of equity is still important.⁶² Third, and most important, to set aside fraudulent conveyances. If A conveys land to B in fraud of A's creditors, the conveyance is utterly void at common law as well as in equity, and the land may be subjected to execution by A's judgment creditor. Practically, however, the creditor's right to levy execution is of little value to him. The purchaser at the execution sale will take the land subject to the cloud created by A's prior conveyance to B. Equity, therefore, takes jurisdiction to remove this cloud before instead of after the judicial sale; declares the conveyance to B void, and by way of complete relief orders a sale of the land to satisfy the debt.⁶³

97. Same subject—When the legal remedy is adequate.—It is the general rule that equity lends its aid only to creditors who have reduced their claims

⁶¹ Bay State Iron Co. v. Goodall, 39 N. H. 223, 75 Am. Dec. 219.

⁶² Ager v. Murray, 105 U. S. 126, 26 L. Ed. 442 (patent right); Cochran v. Cochran, 62 Neb. 450, 87 N. W. 152 (equitable interests).

⁶³ Brown v. J. Wayland Kimball Co., 84 Me. 492, 24 Atl 1007.

to judgment. To this rule there are some exceptions; as, where the debtor has absconded or removed from the state.⁶⁴ How far the creditor must pursue his legal remedy beyond the judgment is a question on which the various jurisdictions greatly differ. When the object of the suit is to reach property not subject to execution at law, it is generally agreed that he must demonstrate the inadequacy of the legal remedy by actual experiment before the court will entertain his bill; that is to say, execution must be issued on his judgment, and the sheriff's return *nulla bona* (no property found) be made; thus furnishing the court with the best possible proof that the legal remedy is inadequate.⁶⁵

98. **Exoneration.**—The relation of principal and surety gives rise to several equitable remedies.⁶⁶ Where the surety has paid the principal's debt, either voluntarily or by compulsion, or any part of the debt, he has a claim for reimbursement against the principal. This claim is usually enforceable by action at law, but a suit in equity is sometimes resorted to.⁶⁷ The term exoneration is more properly applied, perhaps, to the suit in equity by the surety to compel the principal debtor to pay the debt or obligation to the creditor, and thus relieve the surety of the risk of being compelled to pay. Such suit will lie whether the surety has or has not been sued

⁶⁴ Merchants' Nat. Bank v. Paine, 13 R. I. 592, 1 Scott, Cases on Equity, p. 136, LEADING ILLUSTRATIVE CASES.

⁶⁵ Minkler v. U. S. Sheep Co., 4 N. Dak. 507, 62 N. W. 594, 33 L. R. A. 546.

⁶⁶ Subrogation is more conveniently treated elsewhere, in connection with mortgages. See §§ 157, 158.

⁶⁷ Beal v. Brown, 13 Allen 114 (Mass.); Bonney v. Seely, 2 Wend. 481 (N. Y.).

by the creditor; but, of course, the debt must be payable at the time when the suit is brought.⁶⁸

99. **Contribution.**—Suppose that A, B, and C are sureties of X to secure his debt or obligation to Y. Y collects the whole amount, \$1,500, from A. A has not only the right of reimbursement against X, but the right to compel B and C each to contribute his proportionate share. This right may be enforced by common law action against B and C for \$500, respectively; and in ordinary cases the common law remedy is adequate. The rules of equity as to parties, however, by which all the sureties and the principal may be joined in a single suit, often furnish a considerable advantage in favor of a suit in equity. Thus, if in the case put, it appears that B is insolvent and hence unable to contribute his just proportion, A, by a suit in equity, can compel C to share the burden equally, contributing \$750 to A's reimbursement instead of \$500.⁶⁹

The principle of contribution extends not only to sureties, but to all who are jointly, or jointly and severally, liable on the same obligation. It is the most striking illustration of the maxim, "Equality is equity."⁷⁰ There is, however, no contribution among tort-feasors, as a general thing.⁷¹

100. **Accounting.**—The ancient common law action of account render, tried without a jury, lay only

⁶⁸ *Dobie v. Fidelity, etc., Co.*, 95 Wis. 540, 70 N. W. 482, 60 Am. St. Rep. 135.

⁶⁹ *Bosley v. Taylor*, 5 Dana 157 (Ky.), 30 Am. Dec. 677; 2 *Pomeroy, Equitable Remedies*, § 915.

⁷⁰ See also § 228.

⁷¹ *Johnson v. Torpy*, 35 Neb. 604, 37 Am. St. Rep. 447, 53 N. W. 575.

against certain narrowly limited parties, and was subject to other serious defects; the parties could not be examined on oath, and disputed items could be settled only by issues in court before a jury. Assumpsit for the balance of a long account was an almost impossible remedy, for a dispute as to the correct balance meant that the jury must investigate each item, a task for which they are manifestly unfit.⁷² The equitable remedy of accounting, therefore, grew up, subject to none of these objections. Accounting is an incident of a great variety of equitable remedies—such as redemption or foreclosure of mortgages, when the mortgagee is in possession;⁷³ partition; injunction against the infringement of patents;⁷⁴ and is the principal relief in equity between members of a partnership⁷⁵ or by creditors against an insolvent partnership; by beneficiaries against trustees⁷⁶ or quasi trustees.⁷⁷ Where accounting is sought as an independent relief between parties not in a fiduciary relationship, the jurisdictional question arises, Is the remedy at law inadequate? and this is often a question of considerable difficulty.

101. Same subject—When the legal remedy is inadequate.—The remedy at law is deemed to be inadequate, and accounting will lie in equity: (1) Where the accounts are mutual; that is, where A

⁷² Pomeroy, Equity Jurisprudence, § 1420, and note.

⁷³ See § 148.

⁷⁴ See § 55.

⁷⁵ 2 Pomeroy, Equitable Remedies, §§ 937-942.

⁷⁶ See §§ 134, 135.

⁷⁷ See § 138.

has received and paid on account of B, and B has received and paid on account of A.⁷⁸ (2) Where the accounts are extremely complicated.⁷⁹ Whether, independently of these grounds, an accounting will lie by a principal against an agent, is a question of much difficulty. If the agent is a confidential one, and accounting is sought of matters exclusively within his knowledge, the case is one for equity;⁸⁰ but in the absence of this and the other grounds just mentioned, the suit does not generally lie.⁸¹ The principal is not usually under a duty to account to the agent,⁸² but may be if the agent's salary depends on the principal's profits.⁸³ The ordinary relation of banker and depositor is one of debtor and creditor merely, and so does not require an accounting between them in equity.⁸⁴

⁷⁸ *Phillips v. Phillips*, 9 Hare 471 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 449; *Haywood v. Hutchins*, 65 N. C. 574, 1 Ames, Equity Jurisdiction Cases, p. 459; *Garner v. Reis*, 25 Minn. 475, 3 Keener, Equity Jurisdiction Cases, p. 920.

⁷⁹ *Taff Vale Ry. v. Nixon*, 1 H. L. Cas. 111 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 454, 3 Keener, Equity Jurisdiction Cases, p. 888; *Pierce v. Equitable Life Assurance Society*, 145 Mass. 56, 12 N. E. 858, 3 Keener, Equity Jurisdiction Cases, p. 929; compare *Uhlman v. New York Life Ins. Co.*, 109 N. Y. 421, 4 Am. St. Rep. 482, 17 N. E. 363.

⁸⁰ *Mackenzie v. Johnston*, 4 Madd. 373 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 444, 3 Keener, Equity Jurisdiction Cases, p. 885; *Marvin v. Brooks*, 94 N. Y. 71, 3 Keener, Equity Jurisdiction Cases, p. 924.

⁸¹ *Moxon v. Bright*, L. R. 4 Ch. 292 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 450, 3 Keener, Equity Jurisdiction Cases, p. 918.

⁸² *Smith v. Leveaux*, 2 De G. J. & S. 1 (Eng.), 3 Keener, Equity Jurisdiction Cases, p. 913.

⁸³ *Harrington v. Churchward*, 6 Jur. N. S. 576 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 457; *Alpaugh v. Wood*, 45 N. J. Eq. 153, 16 Atl. 676, 3 Keener, Equity Jurisdiction Cases, p. 943.

⁸⁴ *Foley v. Hill*, 2 H. L. Cas. 28 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 446, 3 Keener, Equity Jurisdiction Cases, p. 897.

CHAPTER VII.

PROVISIONAL REMEDIES—THE AUXILIARY JURISDICTION.

102. **Provisional remedies.**—Certain remedies in equity do not result in a final determination of a controversy and award of relief, but are preliminary or provisional. The preliminary injunction has already been illustrated;⁸⁵ in addition to this, we have the important remedies of Interpleader and Receivers. To these may be added, the suit for Discovery, and certain other remedies, now nearly or quite obsolete, which relate to the taking of testimony for use in actions at law.

103. **Interpleader.**—X makes A his tenant; later, X has a transaction with Y, which Y claims is an assignment of A's rent; X denies the assignment; both X and Y claim the rent from A. A is in doubt whether he should pay X or Y. He is threatened with two suits for the same demand. Of course, if he defends these suits properly, with full evidence of the transaction between X and Y, there can be only one recovery against him; but if he takes a chance and pays Y, that payment will be no defense to X's suit if X turns out to be the rightful claimant. As respects the rental, A is a mere stakeholder, entirely indifferent whether he should pay X or Y. By force of circumstances he is exposed to the vex-

⁸⁵ See §§ 44, 49, 54.

ation and expense of defending two law suits for the same demand.⁸⁶ Until comparatively recent years the common law afforded him no relief from his predicament; his only relief was, and in many states still is, by bill of interpleader. Interpleader will lie—subject to certain restrictions which will be explained in the following paragraphs—when a person is exposed to the danger of suit by two or more persons for the same thing, debt, or duty. On such a bill the plaintiff—making oath that he is not in collusion with either claimant—brings into court the article or money which is the subject of the conflicting claims, and on proper pleadings and proofs obtains a decree that the claimants do interplead, and if necessary an injunction to stay their suits against him. After such a decree, he drops out of the case entirely, and the litigation may proceed though he dies during the progress of the litigation between the rival claimants.⁸⁷

104. Same subject—Same thing—Debt or duty.—The same thing, debt or duty must be claimed by each defendant in order that interpleader may lie. Thus, suppose X sells A an article, and Y then claims that the article belongs to himself and was not X's to sell. Now, if X were to claim that the sale was invalid for some reason, so that the article must be returned to him, and Y also claimed the article itself, obviously the same thing would be demanded; or if X and Y each claimed damages for the conver-

⁸⁶ *Cowtan v. Williams*, 9 Ves. 107 (Eng.), 2 Ames, Equity Jurisdiction Cases, p. 8, 1 Keener, Equity Jurisdiction Cases, p. 213.

⁸⁷ Anonymous, 1 Vern 351 (Eng.), 2 Ames, Equity Jurisdiction Cases, p. 2. See *Platte Valley St. Bank v. Nat'l Live Stock Bank*, 155 Ill. 250, LEADING ILLUSTRATIVE CASES.

sion of the chattel by A, we would have an instance of the same duty.⁸⁸ In the last paragraph we had an example of the same debt—the claim of rental. But suppose X affirms the sale and demands the price, while Y demands damages for the conversion of the chattel. These demands are not legally the same within the meaning of the rule, and interpleader will not lie.⁸⁹ Again, the facts frequently present a question whether the plaintiff is not liable to both of the claimants instead of to one; where this question is in doubt, the case is not one for interpleader: as, where an insurance company issued a policy to F, payable on his death to E; without E's consent, the policy was surrendered and a new one issued to F for the benefit of C; there being a doubt upon these facts whether the company was not liable both to E and to C, the company's bill of interpleader was dismissed.⁹⁰

105. Same subject—Plaintiff a mere stakeholder.—The plaintiff himself must not claim any interest in the thing or fund in controversy. The interpleader procedure requires that he deposit the thing or fund in court, and be prepared to drop out of the case when the interpleader order is made. His demand for interpleader cannot be mixed up with a claim of his own. Thus, where X and Y each claimed the purchase price of certain merchandise from A, and A demanded interpleader but with a deduction

⁸⁸ Pomeroy, Equity Jurisprudence, § 1323, note.

⁸⁹ *Slaney v. Sidney*, 14 M. & W. 800 (Eng.), 2 Ames, Equity Jurisdiction Cases, p. 11.

⁹⁰ *National Life Ins. Co. v. Pingrey*, 141 Mass. 411, 2 Ames, Equity Jurisdiction Cases, p. 37, 1 Keener, Equity Jurisdiction Cases, p. 259.

of freight charges which he had paid, relief was refused.⁹¹ So, where plaintiff A, an auctioneer who had sold certain land for X, and received a deposit on the purchase price from Y, the purchaser, was subjected to a demand from Y for return of the deposit on the ground that the sale was void, he could not interplead X and Y with reference to the deposit, and at the same time retain a portion of the deposit as his commissions. If Y's demand to avoid the sale was justified, A, of course, was entitled to no commission whatever from the fund but must look to X for payment.⁹²

106. Same subject—Privity between the claimants.—The stakeholder's right of interpleader is subject to the highly technical requirement, that the opposing claimants' titles must be in privity with each other—one derived from the other, or both derived from a common source. If Y claims by a title entirely adverse or hostile to X's title, there can be no interpleader. Thus, suppose X deposited an article with A as bailee; Y claims that the article never belonged to X but that his possession and dealing with the article were entirely wrongful and tortious as to Y. A cannot have interpleader.⁹³ Or, to take the illustration of § 103, suppose Y claimed the rent, not as assignee of X, but by an adverse title—X being devisee of the land under a will and Y the

⁹¹ *Baltimore & Ohio R. Co. v. Arthur*, 90 N. Y. 234, 2 Ames, *Equity Jurisdiction Cases*, p. 13, 1 Keener, *Equity Jurisdiction Cases*, p. 293.

⁹² *Mitchell v. Hayne*, 2 Sim. & St. 63 (Eng.), 2 Ames, *Equity Jurisdiction Cases*, p. 12, 1 Keener, *Equity Jurisdiction Cases*, p. 292.

⁹³ *First National Bank v. Bining*, 26 N. J. Eq. 345, 2 Ames, *Equity Jurisdiction Cases*, p. 24.

heir claiming in hostility to the will. Here again, there is no privity between the claimants.⁹⁴ The rule is, manifestly, a wholly arbitrary one. The hardship on A is just as great, whether the demands of X and Y are connected or independent; and the machinery of the interpleader procedure will run just as smoothly in either case. The rule, therefore, has been abolished in England by statute;⁹⁵ but scarcely any American states have seen fit to change it.⁹⁶

107. Same subject—No independent liability to either claimant.—If the plaintiff is under an independent liability to one of the claimants, no matter which of them may have the superior claim to the subject matter, he cannot have interpleader. Thus, V stored certain iron with A, a warehouseman. Thereupon, V gave X an order for the iron, and A acknowledged his liability to X in such a way as to create a binding contract to deliver it to X. Later Y claimed the iron by a title paramount to V and X. A could not have interpleader to determine to whom he should deliver the iron.⁹⁷ It is said, in justification of the rule, that if Y were found to be the true owner of the iron, the litigation would not be at an end, but A would still have to answer in damages to X. The answer to this argument appears to be, that in cases where X is found to be the owner, that would end the matter; in fifty per cent of the instances

⁹⁴ *Johnson v. Atkinson*, 3 Anstr. 798 (Eng.), 2 Ames, Equity Jurisdiction Cases, p. 10.

⁹⁵ *Attenborough v. London, etc., Dock Co.*, L. R. 3 C. P. D. 450 (Eng.).

⁹⁶ *Pomeroy*, Equity Jurisprudence, § 1324, note.

⁹⁷ *Crawshay v. Thornton*, 2 My. & Cr. 1, 19-24 (Eng.), 2 Ames, Equity Jurisdiction Cases, p. 18, 1 Keener, Equity Jurisdiction Cases, p. 220.

where plaintiff is under an independent liability, the interpleader order would be final so far as he is concerned. There appears to be no sound reason why the bailee should not be permitted to get the article off his hands, even if he still remains liable to a subsequent suit for damages.

Interpleader is one of the few topics of equity that needs a statutory overhauling to free it from the technicalities with which it is encumbered.

108. **Receivers.**—A receiver is a person appointed by the court in a chancery suit to hold, and in some cases to manage, the property involved in the litigation while it continues. During his appointment he acts as agent or officer of the court, not as the agent of either of the parties; and as agent is subject to the court's directions. The appointment of a receiver to take the possession of property away from the legal owner temporarily is the most drastic of all equitable remedies, only to be used with great caution, and where it is reasonably probable that the plaintiff will succeed in the purpose of his suit.⁹⁸ The appointment does not depend upon hard and fast rules, but rests in the sound discretion of the court.⁹⁹ It will rarely be made without notice to the defendant, if he can be reached, and an opportunity to be heard against the appointment; unless there is an urgent necessity for the court to interfere at once, to prevent the squander-

⁹⁸ *Blondheim v. Moore*, 11 Md. 365; *Bank of Florence v. U. S. S. & L. Co.*, 104 Ala. 297, 16 South. 110, H. & B. 897.

⁹⁹ *Mays v. Rose*, Freem. Ch. 703 (Miss.); *Simmons Hardware Co. v. Waibel*, 1 S. Dak. 488, 47 N. W. 814, 814, 36 Am. St. Rep. 755, 11 L. R. A. 267, H. & B. 817.

ing or destruction of the property.¹ It is usually considered improper for the court to appoint as receiver one who is personally interested in the success of either party,² but in naming receivers of corporations the courts have sometimes felt obliged to break through this rule and appoint an officer of the corporation who is familiar with its complicated business.³

109. **Same subject—When appointed.**—We can enumerate only a few of the very many instances where the appointment of a receiver is appropriate. Most of these instances involve the facts that the person in possession is under a fiduciary duty—a quasi-trust relation—to the plaintiff, and is violating that duty by wasting the property or misapplying its proceeds: (1) In proceedings for the dissolution of a partnership, or after a dissolution, where there is a serious disagreement among the partners as to the management of the business, or one partner excludes the other from participation therein.⁴ (2) In suits against trustees who are endangering the trust property by their misconduct.⁵ (3) In creditors' suits by judgment creditors.⁶ (4) In bankruptcy proceedings.⁷ (5) In suits to foreclose a

¹ *Blondheim v. Moore*, 11 Md. 365; *St. Louis, K. & S. R. Co. v. Wear*, 135 Mo. 230, 36 S. W. 357, 658, 33 L. R. A. 341, H. & B. 823.

² *Merchants', etc., Nat. Bank v. Kent Circuit Judge*, 43 Mich. 292, 5 N. W. 627, H. & B. 855 (partner of attorney for a party).

³ *Fowler v. Jarvis-Conklin, etc., Co.*, 63 Fed. 888, 66 Fed. 14.

⁴ *Goodman v. Whitecomb*, 1 Jac. & W. 589 (Eng.); *Const v. Harris*, Turn. & R. 517 (Eng.); *McElvey v. Lewis*, 76 N. Y. 373.

⁵ *Latham v. Chafee*, 7 Fed. 520.

⁶ See § 96; *Bloodgood v. Clark*, 4 Paige 574 (N. Y.); *Coates Bros. v. Wilkes*, 92 N. C. 376.

⁷ See Bankruptcy Act of 1898, § 2, clauses 3 and 5.

mortgage or other lien. This is a common occasion for the appointment of a receiver, and the rules determining when the appointment is proper are fairly definite. At the outset of a foreclosure suit the mortgagee may have a receiver appointed on showing that the property is an inadequate security for the mortgage—that is, that it will not yield enough on foreclosure sale to pay the mortgage and accrued interest; and at the same time that a deficiency judgment against the mortgagor probably cannot be collected, either because he is insolvent, or of doubtful financial responsibility, or is outside the state and so cannot be reached. The function of such a receiver is to collect the rents and profits of the land pending the foreclosure proceedings and apply them to the payment of the mortgage debt—a duty which the mortgagor himself owes to the mortgagee.⁸ Such receivership is permitted even in the states which forbid the mortgagee himself to take possession on default.⁹

110. Same subject—Corporation receivers.—Corporation receivers are so much the most numerous and important species that the law of receivership is often treated as if it were a branch of the law of corporations. Statutes in many states prescribe in great detail the occasions for the appointment of receivers of insolvent or of dissolved corporations.¹⁰

⁸ *Schreiber v. Carey*, 48 Wis. 208, 4 N. W. 124; *Lindsay v. American Mortgage Co.*, 97 Ala. 412, 11 South. 770.

⁹ *Schreiber v. Carey*, 48 Wis. 208. See § 150.

¹⁰ This legislation is described in a general way in the long but interesting opinion in *Havemeyer v. Superior Court*, 84 Cal. 327, 363, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627.

Independently of statutes, there are certain well established grounds for the displacement of the board of directors of a corporation by the appointment of a receiver of the corporate property. Thus, in a stockholders' suit to hold the fraudulent or wasteful directors responsible for the breach of their fiduciary duties,¹¹ a receiver is frequently appointed.¹² Also, where there are such dissensions in the board of directors that the business of the corporation cannot be properly carried on, a receiver may be required for the purpose of taking control until a harmonious body can be constituted.¹³ Receivers may be appointed in judgment creditors' suits against corporations equally as well as in similar suits against individuals.¹⁴ Most important of all are receiverships on foreclosure of corporation mortgages.

Railroad receiverships, which attract so much public notice from time to time, usually occur in the course of the foreclosure of mortgages on all the property of the railroad, issued to secure the payment of the railroad's bonds. The vast responsibility of operating railroad systems, often thousands of miles in extent, and for a considerable term of years, thus falls upon the courts of chancery.¹⁵ The

¹¹ See § 138.

¹² *State v. Second Judicial District Court*, 15 Mont. 324, 39 Pac. 316, 48 Am. St. Rep. 682, 27 L. R. A. 392; compare *Alabama Coal & C. Co. v. Shackelford*, 137 Ala. 224, 34 South. 833, 97 Am. St. Rep. 23.

¹³ *Sternberg v. Wolff*, 56 N. J. Eq. 389, 39 Atl. 397, 67 Am. St. Rep. 494, 39 L. R. A. 762.

¹⁴ *Hollins v. Brierfield, etc., Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113.

¹⁵ It is said that about 1895 fully one-third of the railroad mileage of the country was being thus operated by the federal courts.

appointment of a receiver in railroad foreclosures has come to be almost a matter of course.¹⁶

Apart from statutory authority, however, it is generally agreed that a court of equity has no power to dissolve a corporation, or to appoint a receiver for that purpose;¹⁷ or to appoint a receiver at the request of the corporation itself.¹⁸

111. Same subject—The receiver's possession.—Since the receiver is an officer of the court for the time being, his possession is that of the court, and will be jealously protected by the court. Parties to the suit or their agents may be ordered by the court to surrender possession of the property involved in the suit to the receiver, and their disobedience will constitute a contempt of court.¹⁹ Any disturbance whatever of the receiver's possession, without authorization of the appointing court, is a serious contempt of that court.²⁰ Instances of such forbidden interference are: attachment,²¹ or garnishment,²² or execution sale of the property; it is even held, by the weight of authority, that such execution sale is wholly void, passing no title to the purchaser.²³ The property is not subject to levy and

¹⁶ *Central Trust Co. v. Chattanooga, etc., Co.*, 94 Fed. 275, 36 C. C. A. 241; *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 36 Fed. 221, 1 L. R. A. 397.

¹⁷ *Wallace v. Pierce-Wallace Pub. Co.*, 101 Iowa 313, 70 N. W. 216, 63 Am. St. Rep. 389, 38 L. R. A. 122.

¹⁸ *State v. Ross*, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534.

¹⁹ *Brandt v. Allen*, 76 Iowa 50, 40 N. W. 82, 1 L. R. A. 653.

²⁰ *Sercomb v. Catlin*, 128 Ill. 556, 21 N. E. 606, 15 Am. St. Rep. 147.

²¹ *Texas Trunk R. Co. v. Lewis*, 81 Tex. 1, 26 Am. St. Rep. 776, 16 S. W. 647.

²² *Holbrook v. Ford*, 153 Ill. 633, 39 N. E. 1091, 46 Am. St. Rep. 917, 27 L. R. A. 324.

²³ *Wiswall v. Sampson*, 14 How. 52 (U. S.), 14 L. Ed. 322.

sale for taxes without leave of the appointing court.²⁴ This does not mean that receivership property is free from the common burden of taxation, but merely that the state's claim for taxes must be presented to and approved by the court in the same manner as other claims.

Interference with the operation of a railroad under receivership by employes on a "strike" has frequently been punished as contempt.²⁵

112. Same subject—Suits against and by the receiver.—Suits by²⁶ or against the receiver may only be brought by permission of the appointing court. The order appointing the receiver frequently gives him general authority to bring suits; and in many states such authority has been conferred by statute. A suit against the receiver without leave of the appointing court is a contempt of court;²⁷ and not only that, but the proceedings, according to the majority rule, are wholly void, on the ground that the court in which the suit is brought is without jurisdiction.²⁸ Whether leave to sue the receiver should be granted or refused is a matter entirely within the discretion of the appointing court; but leave is not refused without good reason.²⁹ The rule was found to work such inconvenience to suitors where a receivership extended over a vast system of railroads that it was partially abolished, as respects claims arising from

²⁴ Ex parte Tyler, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689.

²⁵ Thomas v. Cincinnati, &c., R. Co., 62 Fed. 803.

²⁶ Phoenix Insurance Co. v. Schultz, 80 Fed. 334, 25 C. C. A. 453.

²⁷ Thompson v. Scott, 4 Dill. 508 (U. S.), Fed. Cas. No. 13,975.

²⁸ Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672.

²⁹ Pacific Ry. Co. v. Wade, 91 Cal. 449, 456, 27 Pac. 768, 25 Am. St. Rep. 201, 13 L. R. A. 754.

the acts of federal receivers, by Congress in 1887.³⁰

113. Same subject—Receiver's management of the property.—The first duty of the receiver, as agent of the court, is, of course, to obey the orders of the court. These constitute his charter of authority; but in carrying out the orders he is allowed considerable discretion in matters of detail. He may not carry on the party's business unless ordered to do so by the court; such order confers upon him, by implication, authority to enter into necessary contracts.³¹ He is under no obligation to carry on unfinished contracts or leases.³² The necessity, for public convenience, of operating railroads which are under receivership, imposes some special duties upon railroad receivers. Such a receiver is often obliged to borrow money for the purpose of keeping the road in operation; and to enable him to borrow to advantage, the court empowers him to issue "receiver's certificates," which are a lien upon the railroad property taking precedence over the secured claims of mortgage bond holders.³³

114. Same subject—Claims against the fund.—The court receives the property into its custody subject to all liens and equities with which it has been impressed;³⁴ but certain claims are superior in rank

³⁰ *Dillingham v. Hawk*, 60 Fed. 494, 9 C. C. A. 101, 23 L. R. A. 517; 1 *Pomeroy*, *Equitable Remedies*, §§ 173, 174.

³¹ *Continental Trust Co. v. Toledo, etc., R. Co.*, 59 Fed. 514. See *Farmers' Loan & Trust Co. v. Grape Creek Coal Co.*, 50 Fed. 481, *LEADING ILLUSTRATIVE CASES*.

³² *Dayton H. Co. v. Felsenthal*, 116 Fed. 961, 54 C. C. A. 537.

³³ *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963.

³⁴ *American Trust, etc., Bank v. McGettigan*, 152 Ind. 582, 71 Am. St. Rep. 345, 52 N. E. 793.

to the secured claims which were attached to the property at the beginning of the receivership, and must be paid first. The claim of the state for taxes comes first of all.³⁵ The receiver's necessary expenses in administering his trust must, in general, be paid before the mortgages and lien holders;³⁶ this includes damages for the negligence of his servants and agents in managing the property or carrying on the business while the receivership continues.³⁷ Unsecured claims against the property arising before his appointment are, of course, postponed in payment to mortgage or other secured indebtedness. A striking exception has been made, however, in the case of railroad receiverships. A railroad has public duties to discharge and must at all hazards be kept a going concern. Employees and material men whose services or supplies are necessary to the continued operation of the road, must be assured that their wages and claims will be paid, those accruing before as well as those accruing after the appointment of the receiver. If the rule were otherwise, a railroad under the shadow of impending insolvency would find it difficult to procure the necessary labor and supplies to keep in operation. By a bold stroke of judicial legislation, therefore, the American courts established the rule, about thirty-four years ago, that unsecured debts of a railroad, incurred a reasonable time before the appointment of a receiver, if falling

³⁵ *Central Trust Co. v. New York, etc., R. Co.*, 110 N. Y. 250, 18 N. E. 92, 1 L. R. A. 260.

³⁶ *McLane v. Placerville, etc., R. Co.*, 66 Cal. 606, 6 Pac. 748.

³⁷ *Bartlett v. Cicero Light, etc., Co.*, 177 Ill. 68, 52 N. E. 339, 69 Am. St. Rep. 206, 42 L. R. A. 715.

within the class of necessary operating expenses, shall be paid in preference to the secured claims of mortgagees.³⁸ This rule does not extend to receiverships of manufacturing corporations, since the public has not the same interest in their continued operation.

115. **The auxiliary jurisdiction—Discovery.**—A small group of equitable remedies, of much more importance formerly than at present, has to do with the taking of evidence for use in trials at law. The purpose for which these remedies is used has led to their being placed in a group by themselves, called the “Auxiliary Jurisdiction.” The common law, before the reforms of the nineteenth century in the law of evidence, furnished no mode by which a party to a suit could be examined as a witness by his adversary, or compelled to produce documents in his possession at the trial on demand of the other party. Now it has been one of the most characteristic features of equity procedure, from the earliest days, that the complainant may, in his bill (pleading), propound questions to the defendant, which the defendant must answer under oath, and thus disclose facts within his knowledge which are material to the complainant’s case. This process is called “discovery,” and is an important part of nearly all equity pleading. It was natural, therefore, that parties to actions at law should wish to avail themselves of this most effective machinery

³⁸ *Kneeland v. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. 950; *Lackawanna, etc., Co. v. Farmers’ Loan & Tr. Co.*, 79 Fed. 202; *Farmers’ Loan & Trust Co. v. Northern Pac. R. Co.*, 74 Fed. 431.

of the chancery courts for the procuring of testimony. The bill for discovery, therefore, came into existence at an early day. In such a bill, the party to the action at law merely demands that the interrogatories of his bill be answered under oath by the defendant. He needs no further relief; having obtained the defendant's answer, the purpose of the equity proceeding is accomplished; and he may now introduce this answer in evidence in the legal action as a written admission of the other party.³⁹

116. Same subject—Effect of statutes upon the jurisdiction.—Modern statutes both in England and in all the states of this country, dating from the middle of the last century, permit a party to an action at law to examine his adversary as a witness, and provide summary methods for compelling the production of books and documents for inspection. The suit for discovery in aid of an action at law has, therefore, in most instances, become unnecessary, and appears to be nearly obsolete. Most states, however, in which the question has arisen, hold that the suit for discovery has not been impliedly abolished, but may still be resorted to when it suits a party's convenience;⁴⁰ but this conclusion is not universal.⁴¹

117. Same subject—Suits for examination of witnesses.—The auxiliary jurisdiction of equity also embraced three suits for the purpose of taking the testimony of witnesses, other than parties to the

³⁹ Pomeroy, *Equity Jurisprudence*, § 191.

⁴⁰ *Reynolds v. Burgess Sulphite Fibre Co.*, 71 N. H. 332, 346, 51 Atl. 1075, 93 Am. St. Rep. 535, 550, 57 L. R. A. 949, 1 Scott, *Cases on Equity*, p. 45.

⁴¹ *Turnbull v. Crick*, 63 Minn. 91, 65 N. W. 135.

action at law, in emergencies where the common law afforded no means for obtaining such testimony. The suit to perpetuate testimony lay where a person had an existing right, but no action could be brought immediately for the purpose of establishing the right. The danger of loss of essential evidence by the death of witnesses was the foundation and occasion of the suit. The suit to take testimony *de bene esse* lay where an action at law was pending but not yet ripe for trial, for the purpose of examining a witness who was sick, or very aged, or about to depart from the country. The third suit lay to take the testimony of witnesses in a foreign country.⁴² These three suits are probably entirely obsolete at the present day, being supplanted by simpler and speedier proceedings established by statute.

⁴² On these three suits, see *Angell v. Angell*, 1 Sim. & St. 83 (Eng.), 2 Ames, Equity Jurisdiction Cases, p. 168.

EQUITABLE PROPERTY RIGHTS AND INTERESTS

118. **Equitable estates.**—So far we have been dealing with what is perhaps the most distinctive part of equity, its peculiar system of remedies, entirely different, for the most part, from the remedies known to the common law. A second grand division of the subject (as usually treated) has to do with equitable estates or property rights, and equitable liens: and, incidentally, with the remedies for their enforcement. An example has already been given of what is generally called an equitable estate, in the interest which a vendee of land under a valid, enforceable contract, holds in the land. As we saw, he is regarded in equity, in most respects, as the true owner, though the legal title is still in his vendor; for example, on his death his interest devolves, as land, upon his heirs, not upon his administrator: and he must, as owner, bear the loss resulting from the accidental destruction of the property. This separation of the legal title and the beneficial interest is the characteristic feature of equitable estates. The legal title is in A, the only owner whom the common law recognizes, and whose legal title is not denied by equity; while the beneficial interest,

in greater or less degree, is in B, the equitable owner. In many cases this separation of the legal and equitable ownership is convenient and desirable, and therefore is treated as permanent; as in the case of an express trustee, who holds the legal title for the benefit of the cestui que trust or beneficiary: or of the mortgagee, who holds the legal title as security for his claim. In other cases, the sole duty of the legal owner, A, is to convert the equitable into a full ownership by conveyance of the legal title to the equitable owner, B.⁴³

⁴³ 1 Pomeroy, *Equity Jurisprudence*, §§ 146-149.

CHAPTER VIII.

TRUSTS.

119. **Uses.**—Some time in the later middle ages, probably in the fourteenth century,⁴⁴ the desire of the clergy to evade the statutes of mortmain, which restricted their ownership of land, and of land owners to escape the heavy feudal burdens, led to the invention of the Use—a conveyance of the legal title by A to B to the use of C, or by A to B for the use of A himself. The common law courts refused to recognize any ownership in the beneficiary or cestui que use; his ownership was protected, at first by the clergy acting upon the conscience of the holder of the legal title, and presently by the courts of chancery.⁴⁵ When fully developed, the use was the full beneficial ownership of the land, freed from feudal burdens and from many common law incidents, such as dower. The cestui que use had the right of possession; the use descended to his heirs, and the holder of the legal title was bound to convey it, on the request of the cestui que use, and to defend his possession from the intrusion of third persons.⁴⁶ By the middle of the fifteenth century it is said that the greater part of the land in England was held in this manner.

120. **The Statute of Uses—Trusts.**—In the year

⁴⁴ 1 Spence, *Equitable Jurisdiction*, pp. 439-442.

⁴⁵ 1 Spence, *Equitable Jurisdiction*, pp. 445, 446.

⁴⁶ Bacon, *Reading on Uses*, p. 9.

1535, the king, Henry VIII, caused a statute to be passed for the avowed purpose of preventing the further growth of uses. This statute, however, instead of prohibiting uses, adopted the curious expedient of declaring (in substance) that when land was conveyed to A in fee or for life for the use of B, a legal estate of the same extent as the use should become vested in B. The statute, however, was given a very narrow application by the courts. It did not apply, for example, where A had any active duties to perform. Again, the case having arisen where land was conveyed to A to the use of B to the use of C, it was held that the statute vested the legal title in B,⁴⁷ while C obtained an equitable estate as before the statute.⁴⁸ The net result of the statute was to effect great changes in the law of conveyancing, giving rise to forms of deeds which are in common use today;⁴⁹ but the doctrines of equity which had grown up relating to uses remained substantially unimpaired. Verbal changes were made, however; the beneficial interest recognized by equity alone was called a trust; the holder of the legal title was called a trustee; and the holder of the beneficial interest was called the cestui que trust or, less technically, the beneficiary.

121. Classes of trusts—Passive trusts.—Trusts are divided into two classes, express trusts, intentionally created by the act of a party, and trusts arising by operation of law.⁵⁰ Express trusts com-

⁴⁷ *Tyrrel's Case*, 2 Dyer 155a (Eng.).

⁴⁸ *Hopkins v. Hopkins*, 1 Atk. 581, 590 (Eng.).

⁴⁹ See a brief account in *Pomeroy, Equity Jurisprudence*, § 985, note.

⁵⁰ See §§ 129-133.

prise public or charitable,⁵¹ and private trusts, the latter being created for the benefit of designated persons. Express private trusts, again, may be either passive or active. If land is conveyed to or held by A simply in trust for B, without any words defining A's duties, we have a passive trust. A holds the mere naked legal title to the land, while B holds the full beneficial ownership in equity, and is entitled to the management and control of the land. Such trusts in land are prohibited by statute in some states, and are very uncommon in this country.⁵²

122. **Express active trusts.**—In these the trustee is charged with the performance of active duties for the benefit of the cestuis que trustent or beneficiaries. The terms of the trust generally give the trustee the possession and management of the property, whether real or personal. Trusts may, as a general rule, be created for any purpose not illegal; only a small group of states, following the example of New York, having restricted the purposes for which trusts are allowed. Among the commonest purposes for which trusts are created are: to hold the property, receive the rents and profits and pay them or apply them to the use of designated persons or apply them to designated purposes such as the payment of debts; to hold the property and invest the income for a specified time, not exceeding the period permitted by statute, thus accumulating the entire proceeds—a trust for accumulation; to sell the property and pay the proceeds to designated persons or apply them to

⁵¹ See §§ 126, 127.

⁵² Pomeroy, *Equity Jurisprudence*, § 988.

specified purposes; and in connection with the two purposes first enumerated, to convey the trust property to some person or persons at the expiration of the trust.⁵³

123. Parties to trusts.—Any owner of property who has the legal capacity to dispose of it may create a trust; any person capable of holding property may be a beneficiary or a trustee.⁵⁴ Since the beneficiary's interest is not recognized as an ownership by the common law,⁵⁵ actions at law relating to the property must be brought by the trustee.⁵⁶ The cestui que trust may compel a specific performance of the trustee's duties,⁵⁷ but his interest, under an active trust, can hardly be considered an estate in the land or personal property which is the subject of the trust.⁵⁸

124. Alienation and liability for debts.—The beneficiary's interest may ordinarily be conveyed or assigned by him:⁵⁹ and may in most trusts be reached by his creditors—either by execution, where the scope of the writ of execution has been enlarged sufficiently by statute, or by creditors' bill.⁶⁰ It is the rule in the majority of the states, however, that if the creator of the trust indicates by apt language that the beneficiary is to hold his interest free from

⁵³ Pomeroy, Equity Jurisprudence, §§ 992 and following.

⁵⁴ *Still v. Ruby*, 35 Pa. St. 373, Ames, Cases on Trusts, p. 219; *Re Wadsworth*, 2 Barb. Ch. 381 (N. Y.), Ames, Cases on Trusts, p. 511.

⁵⁵ *Gandy v. Fortner*, 119 Ala. 303, 24 South. 425.

⁵⁶ *Price v. Krasnoff*, 60 S. C. 172, 38 S. E. 413.

⁵⁷ Pomeroy, Equity Jurisprudence, § 1411.

⁵⁸ *Id.*, § 991.

⁵⁹ For an exception in cases of trusts for married women, see § 141.

⁶⁰ See § 96.

the claims of his creditors, this provision will be respected, and his income will be beyond his creditors' reach.⁶¹ Such a provision constitutes what is appropriately called a "spendthrift" trust, and is invalid in some states and in England.⁶² All courts agree that a person cannot create a spendthrift trust for his own benefit, so as to place his property beyond the reach of his creditors.⁶³

125. Descent and succession.—The rules of descent and succession applicable to legal estates apply to the corresponding equitable interests of cestuis que trustent.⁶⁴ In this respect equity follows the law. The husband of a cestui que trust, also, has curtesy in the lands held in trust for his wife under the same circumstances in which he would have curtesy in her legal estate.⁶⁵ Equity was not, however, equally generous to the wife: she had no dower in her husband's equitable interests.⁶⁶ This arbitrary rule has been altered by statute in the wife's favor in most states of this country.

126. Charitable trusts.—If a man were to leave property to be divided among all his fourth cousins,

⁶¹ *Broadway National Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504, Ames, Cases on Trusts, p. 397; *Jackson Square L. & S. Association v. Bartlett*, 95 Md. 661, 53 Atl. 426, 93 Am. St. Rep. 416.

⁶² *Brandon v. Robinson*, 18 Ves. 429 (Eng.), Ames, Trusts, p. 394; *Hutchinson v. Maxwell*, 100 Va. 169, 40 S. E. 655, 93 Am. St. Rep. 944, 57 L. R. A. 384.

⁶³ *Brown v. Macgill*, 87 Md. 161, 39 Atl. 613, 67 Am. St. Rep. 334, 39 L. R. A. 806.

⁶⁴ *Burgess v. Wheate*, 1 Eden 177 (Eng.), Ames, Cases on Trusts, p. 356, 1 Scott, Cases on Equity, pp. 58, 316; *Middleton v. Spicer*, 1 Br. Ch. Cas. 201 (Eng.), Ames, Cases on Trusts, p. 364.

⁶⁵ *Appleton v. Rowley*, L. R. 8 Eq. 139 (Eng.), Ames, Cases on Trusts, p. 381.

⁶⁶ *D'Arcy v. Blake*, 2 Sch. & Lef. 387 (Ire.), Ames, Cases on Trusts, p. 376.

the beneficiaries, though perhaps several hundred in number, are exactly ascertainable—the trust is of the private class. If he were to leave a sum of money in trust for all the dark haired persons in the town of X, the trust, still a private one, would probably fail for uncertainty as to the beneficiaries. Suppose he leaves a sum to A in trust for “the poor” of the town of X. This is a highly indefinite description of the objects of his bounty: but the trust, in nearly all states, will be upheld, since it is for a public or charitable object—the relief of poverty.⁶⁷ Again, A leaves a sum of money in trust for the perpetual repair of his tomb. This is a private object, and the trust must fail, as creating a perpetuity.⁶⁸ Suppose, however, that he leaves a sum in trust to keep the Soldiers’ Monument in the town of X in perpetual repair. This is a public trust, for the benefit of the whole community, and the rule against perpetuities does not apply. These, then, are the characteristics of a charitable trust; the beneficiaries are indefinite, the purpose is a public benefit, and the duration of the trust is not limited by the rule against perpetuities.

127. What are public or charitable purposes.— This is a question that can only be elucidated by numerous examples. Gifts for the support of religion are freely upheld, no distinction among religious beliefs being recognized by the courts of this

⁶⁷ Bishop of Hereford v. Adams, 7 Ves. 324 (Eng.); Hunt v. Fowler, 121 Ill. 269, 12 N. E. 331, 17 N. E. 491, H. & B. 438, LEADING ILLUSTRATIVE CASES.

⁶⁸ See Estate of Gay, 138 Cal. 552, 71 Pac. 707, 94 Am. St. Rep. 70. For the rule against perpetuities, see article on REAL PROPERTY.

country, at any rate.⁶⁹ So with trusts for any of the objects which are popularly called charitable; as, to the poor, to hospitals and asylums, to widows and orphans.⁷⁰ A gift to a private benefit society or association, however, not limited in its distribution to members who are in need, is generally considered not a charity but a private trust.⁷¹ Gifts for all manner of educational purposes, for the advancement of science, knowledge, or art, are charitable gifts, in the legal meaning of the term,⁷² and their validity does not depend at all upon the truth or falsity of the opinions sought to be promoted by the gift, so long as they are not immoral or illegal; thus, a trust for the circulation of the books of Henry George, which attacked the right of private property in land, was upheld.⁷³ In general, any gift which benefits the public as distinguished from individuals,—as, for the erection of a court-house⁷⁴—may be a valid charitable trust.

128. Creation of express trusts.—The Statute of Frauds provides, in substance, that a trust in lands

⁶⁹ Even though the language of the gift is very broad and indefinite: as, “to the service of God.” *In re Darling*, (1896) 1 Ch. 50 (Eng.). Some religious objects have been held to be essentially private, however, as, masses for the soul of the donor: *Festorazzi v. St. Joseph’s Catholic Church*, 104 Ala. 327, 18 South. 394, 53 Am. St. Rep. 48, 25 L. R. A. 360 (but on this point the cases are in conflict); and see *Cocks v. Manners*, L. R. 12 Eq. 574 (Eng.); *Kelly v. Nichols*, 17 R. I. 306, 21 Atl. 906; and numerous cases in 3 Pomeroy, *Equity Jurisprudence* (3d ed.), § 1021, note.

⁷⁰ See examples in 3 Pomeroy, *Equity Jurisprudence* (3d ed.), § 1022, note.

⁷¹ *Cunnaek v. Edwards*, (1896) 2 Ch. 679 (Eng.).

⁷² *In re John’s Will*, 30 Ore. 494, 47 Pac. 341, 36 L. R. A. 242; *Almy v. Jones*, 17 R. I. 265, 21 Atl. 616, 12 L. R. A. 414.

⁷³ *George v. Braddock*, 45 N. J. Eq. 757, 18 Atl. 881, 14 Am. St. Rep. 754, 6 L. R. A. 511.

⁷⁴ *Stuart v. City of Easton*, 74 Fed. 854, 21 C. C. A. 146, 39 U. S. App. 238.

shall be proved by some writing signed by the party who is by law enabled to declare the trust. Under the language of the Statute, the writing may be subsequent in time to the declaration of the trust. Thus, A, wishing to create a trust in Blackacre in favor of C, may convey it to B and in the deed of conveyance state that B shall hold in trust for C: or after his conveyance to B without mention of the trust, B may execute a writing declaring that he holds in trust for C; or, A, without any conveyance may declare in writing that he, A, holds Blackacre in trust for C.⁷⁵ Trusts in personal property are not embraced within the Statute, and may be proved orally.⁷⁶ The writing evidencing a trust in lands may be perfectly informal and untechnical: the words "trust" or "trustee" need not be used; but there must be a reasonable degree of certainty as to the property to be held in trust, as to the beneficiaries (except in charitable trusts), and the nature of the beneficiary's interest.⁷⁷ The intention to create a trust is often gathered, not from particular words, but by construction of the whole will or other instrument.⁷⁸

129. Resulting and constructive trusts.—We have now to consider trusts created not by the deliberate act of the parties but by operation of law—much the more common and important class, in this

⁷⁵ See cases cited, Pomeroy, *Equity Jurisprudence*, § 1007.

⁷⁶ *McFadden v. Jenkins*, 1 Phill. Ch. 153, 157 (Eng.), Ames, *Cases on Trusts*, p. 47; *Danser v. Warwick*, 33 N. J. Eq. 133, Ames, *Cases on Trusts*, p. 186.

⁷⁷ Pomeroy, *Equity Jurisprudence*, § 1009

⁷⁸ *Id.*, §§ 1010-1017.

country. There are two distinctive features of these trusts: first, the act of the trustee in withholding the legal estate from the beneficiary is wrongful; it is his duty to make, and the beneficiary's right to receive, an immediate conveyance;⁷⁹ second, since they do not arise from the declaration of the parties but by operation of law, the Statute of Frauds has no application.⁸⁰ They are divided into two groups, resulting trusts and constructive trusts—the latter group always involving and depending upon some fraud, actual or constructive, on the part of the person declared by equity to be a trustee.⁸¹

130. Resulting trusts.—The two commonest species of these trusts are: first, where an express trust has been created, but fails in whole or in part; as, where it is illegal,⁸² or too uncertain to be carried out,⁸³ or lapses by the death of the beneficiary;⁸⁴ in such cases, the person named as trustee does not acquire a beneficial interest but holds the property for the creator of the trust; or if the latter be dead, for his heirs or administrator, or his residuary devisees or legatees; unless, of course, the creator of the trust has made some other disposition of the property to meet the emergency. Second, suppose property is conveyed to A, but the purchase price is paid by B, as part of the same transaction; in accordance with a doctrine that dates back to a time

⁷⁹ Pomeroy, Equity Jurisprudence, § 1058.

⁸⁰ Id., § 1030.

⁸¹ Id., § 1044.

⁸² Pawson v. Brown, L. R. 13 Ch. Div. 202 (Eng.).

⁸³ Nichols v. Allen, 130 Mass. 211, 39 Am. Rep. 445.

⁸⁴ Ackroyd v. Smithson, 1 Brown Ch. 503 (Eng.), 3 Keener, Equity Jurisdiction Cases, p. 977, 1 Scott, Cases on Equity, p. 621.

before the Statute of Uses,⁸⁵ the equitable estate follows the consideration, and A, by operation of law, holds the property on a resulting trust for B.⁸⁶ Since this result, however, depends upon the presumed intention of the parties, it is open to A to show by parol evidence that a gift was intended by B to A, and no trust results.⁸⁷ Again, if A, in whose name the property is taken, is the child or wife of B, or a person whom B is under obligation to support, the transaction is taken to be a gift to A;⁸⁸ unless, indeed, B succeeds in establishing by clear proof that a trust in his favor was intended.⁸⁹

131. Constructive trusts.—The following are some of the more important species of constructive trusts: A, a trustee, or a person in a fiduciary relation to B—such as an agent or attorney—takes advantage of his relation and unfairly acquires the property by purchase or gift from B; or purchases it at a public or private sale of the property:⁹⁰ or uses it in his business and thereby acquires a profit:⁹¹ in all such cases a trust for B is impressed upon the property or the profits. A and B, partners, occupy certain premises for the purpose of their business under a lease which is about to expire; A takes a

⁸⁵ Pomeroy, *Equity Jurisprudence*, § 981.

⁸⁶ *Dyer v. Dyer*, 2 Cox 92 (Eng.), H. & B. 452; *Ducie v. Ford*, 138 U. S. 587, 11 Sup. Ct. 417, 34 L. Ed. 1091; *Reynolds v. Sumner*, 126 Ill. 58, 18 N. E. 334, 9 Am. St. Rep. 523, and note, 1 L. R. A. 327.

⁸⁷ *Ward v. Ward*, 59 Conn. 188, 22 Atl. 149.

⁸⁸ *Dyer v. Dyer*, 2 Cox 92 (Eng.), H. & B. 452; *Smithsonian Institute v. Meech*, 169 U. S. 398, 18 Sup. Ct. 396, 42 L. Ed. 793; *Cooley v. Cooley*, 172 Mass. 476, 52 N. E. 631.

⁸⁹ *Kilpin v. Kilpin*, 1 Mylne & K. 520 (Eng.).

⁹⁰ For examples, see § 180.

⁹¹ See §§ 134, 135.

renewal of the lease from the lessor for his own exclusive benefit: he will hold the premises in trust for the firm and usually will be compelled to assign the lease to the firm.⁹² A trustee or other person holding trust funds uses them to purchase property—either with or without authority—and takes the title in his own name, without declaring any trust: he nevertheless holds the property so purchased in trust for the person to whom the fund belonged.⁹³

132. **Same subject.**—The trustee, in breach of the trust, conveys or transfers the property to a person who is not a bona fide purchaser for a valuable consideration without notice; such person in turn becomes a trustee, and the property may be followed in his hands so long as it can be identified.⁹⁴ The beneficiary, too, has the option of following the proceeds of the sale by the trustee in the trustee's hands; and if the trustee uses the proceeds in the purchase of other property, a trust attaches to that property. In general, the property which is the subject of the original trust remains impressed with a trust, no matter what changes may take place in its form. The trustee cannot rid himself of his responsibility by his own misconduct.⁹⁵

133. **Same subject—Trusts ex maleficio.**—In general, whenever property is acquired through actual or constructive fraud, it is impressed with a con-

⁹² Mitchell v. Reed, 61 N. Y. 123, 19 Am. Rep. 252, H. & B. 48.

⁹³ Ferris v. Van Vechten, 73 N. Y. 113, H. & B. 461.

⁹⁴ Newton v. Porter, 69 N. Y. 133, 25 Am. Rep. 152, H. & B. 477; Wetmore v. Porter, 92 N. Y. 76, Ames, Cases on Trusts, p. 262.

⁹⁵ Pennell v. Deffell, 4 De G. M. & G. 372, 388 (Eng.); McDonough v. O'Neil, 113 Mass. 92. See Curdy v. Berton, 79 Cal. 420, LEADING ILLUSTRATIVE CASES.

structive trust in favor of the defrauded party. This method of declaring the defrauding party a trustee is a most powerful weapon in the hands of the court of chancery. Among the infinite number of instances of its use are the following: X, a testator, intending to make a devise to B, on account of the fraudulent representations or promises of A that he, A, will carry out X's intentions and confer the intended bounty upon B, X is persuaded to make the devise to A instead. A, after X's death, claims to hold the title free from any claim of B. Equity will impress a trust in B's favor upon A's legal title to the property devised.⁹⁶ Again, B's property is about to be sold at foreclosure or execution sale. A fraudulently promises B to buy in the property, to hold it for B, and convey it to B on being repaid his advances. A purchases, and then refuses to comply with his promise. The promise is, of course, void under the Statute of Frauds; but A is held a constructive trustee on account of his fraud.⁹⁷

134. **Duties of express trustees.**—The trustee's prime duty is to obey the directions of the creator of the trust contained in the declaration of trust. Having once accepted his office, he is liable to the beneficiary if he fails to carry out or disobeys these directions. If there is any genuine doubt as to the meaning of the directions or the terms of the trust, he may bring a suit in equity, at the expense of the estate, to obtain an interpretation of the instrument; and his failure to obey the directions as interpreted

⁹⁶ O'Hara v. Dudley, 95 N. Y. 403, 47 Am. Rep. 53, H. & B. 495.

⁹⁷ Ryan v. Dox, 34 N. Y. 307, 90 Am. Dec. 696, H. & B. 488.

by the court will expose him to punishment for contempt.⁹⁸ It is his duty to keep full and accurate accounts of all his transactions relating to the estate, and these accounts should be open to the inspection of the beneficiary.⁹⁹ At the expiration of his trust, he is bound to surrender the property to the persons who are then entitled to it.¹

135. Duty of care and diligence.—The trustee is not an insurer; but he is bound to use the same degree of skill and care in the management of the trust property that a man of ordinary skill and prudence would use in the management of similar property of his own.² He must exert due diligence to reduce the property to possession and collect debts and demands due to the estate.³ He must not delegate his discretionary powers to another,⁴ but he may employ servants and agents whenever that is in accordance with the usual mode of conducting the business.⁵ He may deposit trust moneys in a bank of good reputation, but only for a reasonable time,⁶ since it is his duty to keep the trust funds invested.⁷ As to the nature of the investments permitted, where

⁹⁸ *Lake View M. & M. Co. v. Hannon*, 93 Ala. 87, 9 South. 539.

⁹⁹ *Waterman v. Alden*, 144 Ill. 90, 32 N. E. 972, H. & B. 549.

¹ *Goodson v. Ellisson*, 3 Russ. 583 (Eng.), Ames, Cases on Trusts, p. 451.

² *King v. Talbot*, 40 N. Y. 76, 50 Barb. 453, Ames, Cases on Trusts, p. 473, H. & B. 511; *Hun v. Cary*, 82 N. Y. 65, 37 Am. Rep. 546, H. & B. 507.

³ *Lowson v. Copeland*, 2 Br. Ch. Cas. 156 (Eng.), Ames, Cases on Trusts, p. 492.

⁴ *Cooke v. Crawford*, 13 Sim. 91 (Eng.), Ames, Cases on Trusts, p. 509.

⁵ *Speight v. Gaunt*, L. R. 22 Ch. Div. 727 (Eng.), Ames, Cases on Trusts, p. 518; *Field v. Field*, (1894) 1 Ch. 425 (Eng.), Ames, Cases on Trusts, p. 505.

⁶ *Cann v. Cann*, 1 P. W. 567 (Eng.), Ames, Cases on Trusts, p. 481.

⁷ *Robinson v. Robinson*, 1 De G. M. & G. 247 (Eng.), Ames, Cases on Trusts, p. 495.

the trust instrument gives no directions on the subject, the rules are very strict. The object of supreme importance is the security of the fund: the trustee is therefore not permitted to take the same amount of risk which an average business man would take in the investment of his own money. He may invest on good security, in first mortgages of land, or in bonds of the state or of the United States; but, unless the rules on the subject have been changed by statute, he should not invest in the stock or bonds of private corporations, much less in personal securities. If any loss results from an improper investment, the trustee must make up the deficiency.⁸

The trustee's duty to act with good faith and solely for the advantage of the beneficiary has already been illustrated, and will be referred to again.⁹

136. The trustee's compensation and allowance.—By the rule of English equity, the trustee is entitled to no compensation for his services, unless such compensation is provided for by the creator of the trust. This harsh rule has been changed in the United States. In many states his compensation is regulated by statute: in the absence of statute, the court awards a reasonable sum, proportioned to the value of his services; unless the rate has been fixed by the trust instrument.¹⁰ In both countries the

⁸ See, as to investments, *Robinson v. Robinson*, 1 De G. M. & G. 247, 263 (Eng.), Ames, Cases on Trusts, p. 495; *King v. Talbot*, 40 N. Y. 76, 50 Barb. 453, Ames, Cases on Trusts, p. 472, H. & B. 511; *Lamar v. Micou*, 112 U. S. 452, 465, 5 Sup. Ct. 221, 28 L. Ed. 751, H. & B. 515; *Harvard College v. Amory*, 9 Pick. 446 (Mass.), H. & B. 526.

⁹ See §§ 131, 132, 180.

¹⁰ *In re Schell*, 53 N. Y. 263, H. & B. 543; *Perkins' Appeal*, 108 Pa. St. 314, 56 Am. Rep. 208.

trustee is entitled to allowance out of the estate for all his proper expenses in connection with the trust.¹¹

137. Removal and appointment of trustees.—The court of equity has considerable discretion in the matter of the removal of trustees. It will remove a trustee who is incompetent through age or infirmity, or who has been guilty of a breach of trust, or who has permanently removed to another country, or who is insolvent.¹² It will also appoint new trustees when there is a vacancy, either because of removal, resignation, death, failure of the trustees named in the instrument to accept, or failure of the instrument creating the trust to name trustees. A trust will not be allowed to fail for lack of a trustee.¹³

138. Quasi-trustees — Corporation directors — Stockholders' suits.—The definition of trust involves the conception that the trustee holds the legal title to the property. In addition, there are many relationships which do not involve this technical element of the trust, which are nevertheless fiduciary in their character, requiring the same duties of good faith and disinterestedness as are exacted of technical trustees. Such are the relationship of guardian and ward, of partners to each other, of many agents to their principals; and to a large extent, of corporation directors to the corporation. We have already seen that the equitable suit for accounting

¹¹ *Worrall v. Harford*, 8 Ves. 4 (Eng.), Ames, Cases on Trusts, p. 415; *New v. Nicoll*, 73 N. Y. 127, 29 Am. Rep. 111.

¹² See *In re Barker's Trusts*, L. R. 1 Ch. Div. 43 (Eng.), Ames, Cases on Trusts, p. 223, H. & B. 54; *May v. May*, 167 U. S. 310, 17 Sup. Ct. 824, 42 L. Ed. 179.

¹³ *Dodkins v. Brunt*, L. R. 6 Eq. 580 (Eng.), Ames, Trusts, p. 226; *Wilding v. Balder*, 21 Beav. 222 (Eng.), Ames, Cases on Trusts, p. 221.

lies against fiduciaries.¹⁴ The equitable remedy against corporation directors is complicated by the fact that they are agents or trustees, primarily not for the stockholders but for the corporation itself, a distinct legal entity;¹⁵ the corporation, therefore, is the proper party to sue for their breach of trust. The board of directors, however, being the governing body of the corporation, is hardly likely to institute a suit for a wrong committed or concurred in by a majority of its members. It is a well settled rule, therefore, that a stockholder desiring relief by way of injunction or accounting for the misconduct of the officers or directors—such as their negligence, causing a loss of corporate funds, or any of the innumerable forms of official “graft,” misappropriation of the property or use of it for their private advantage,—must first request the corporation to sue, and on refusal of the request may himself institute suit, in behalf of the corporation, and making the corporation a party.¹⁶ In some cases, however, he is allowed to sue without alleging such previous demand, where the facts show that it would certainly be refused.¹⁷

¹⁴ See § 100.

¹⁵ *Pomeroy, Equity Jurisprudence*, §§ 1090, 1091.

¹⁶ *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827; *Johns v. McLester*, 137 Ala. 283, 34 South. 174, 97 Am. St. Rep. 27, and note.

¹⁷ *Corbus v. Alaska Treadwell Gold Mining Co.*, 187 U. S. 455, 23 Sup. Ct. 157; *Wineburgh v. U. S. etc. Co.*, 173 Mass. 60, 53 N. E. 145, 73 Am. St. Rep. 261; *Ashton v. Dashaway Ass'n.*, 84 Cal. 61, 22 Pac. 660, 23 Pac. 1091, 7 L. R. A. 809.

CHAPTER IX.

OTHER EQUITABLE PROPERTY RIGHTS—ADMINISTRATION OF ESTATES.

139. **Married women's separate estates.**—The common law disability of married women as respects their rights of property and contract, and the great changes that have taken place in their favor by modern legislation, are treated elsewhere.¹⁸ It is desirable to describe here, very briefly, how equity, through means of the trust, built up the equitable system of married women's separate estates, and so achieved, to a large extent, the purposes which were afterwards accomplished more thoroughly by legislation. If property is given to a trustee for the sole and separate use of a married woman, she takes the beneficial interest during her lifetime free from any control over it by her husband. The same result is reached when property is given to her for her separate use without naming a trustee. The legal estate which the common law then vests in the husband equity declares he must hold for her benefit, and he is treated as in all respects a trustee of the property for the wife.¹⁹ No technical words are necessary to create the separate estate: but the intention must be clear to exclude the husband.²⁰

¹⁸ See subject, DOMESTIC RELATIONS.

¹⁹ *Slanning v. Style*, 3 P. Wms. 334 (Eng.), Ames, Cases on Trusts, p. 164; *Richardson v. DeGiverville*, 107 Mo. 422, 17 S. W. 974, 28 Am. St. Rep. 426.

²⁰ *In re Peacock's Trusts*, L. R. 10 Ch. Div. 490, 495 (Eng.); *Prout v. Roby*, 15 Wall. 471 (U. S.).

140. Her power of disposition and contract.—The power of the wife over her separate estate according to the English²¹ system is fully as great as if she were unmarried. Unless restricted by the instrument creating the estate, she has an absolute power to dispose of it without the assent of her husband, whether it consists of personal property, or a life estate, or an estate in fee in land.²² To enable her enjoyment of and control over her estate to be complete, she was permitted by equity to make contracts with reference to it,²³ and even to make many species of more formal contracts that had no direct reference to it;²⁴ these contracts, of course, were not recognized by the common law, and even in equity they created no personal liability against her; but they created a liability against her separate estate which the creditors could enforce by a suit in equity.²⁵

141. The restraint upon anticipation.—It was found by experience that the creation of the separate estate did not fully accomplish its purpose of removing the wife's property from the husband's control. So long as she had full power of disposition of it and of contracting with reference to it, there was the danger that the moral coercion or influence of the husband might bring it as completely under his control, in many cases, as though he retained his

²¹ The rules of the American jurisdictions with respect to her power to dispose of the separate estate, whether equitable or statutory, and her power to contract, are too numerous and complicated to be noticed here.

²² *Farington v. Parker*, L. R. 4 Eq. 116 (Eng.); *Major v. Lansley*, 2 Russ. & M. 355 (Eng.); *Taylor v. Meads*, 4 De G. J. & S. 597, 604 (Eng.).

²³ *Hodgson v. Williamson*, L. R. 15 Ch. Div. 87 (Eng.).

²⁴ *Murray v. Barlee*, 3 Mylne & K. 209 (Eng.).

²⁵ *Owens v. Dickenson*, Craig & P. 48, 54 (Eng.).

common law rights. Consequently at a comparatively late period, the "restraint upon anticipation" was invented. This was a clause in the instrument of trust or marriage settlement by which the wife was forbidden to bargain or give away the income of her estate in advance of receiving it, or from disposing of or charging the principal of her separate estate.²⁶ The restraint operated only during marriage; before marriage or during widowhood her power over her separate estate was as complete as if no restraint had been created.²⁷

142. **The equity to a settlement.**—The solicitude shown by courts of equity for the welfare of married women was not limited to the protection of separate estates created for them by other persons; in some instances the court created such an estate itself. To be sure, it never went to the extent of ordaining that every married man must relinquish his control over his wife's property. Equity, in modern times, does not run amuck among legal rules and institutions. Its method was more cautious and characteristic. Whenever a husband must resort to equity in order to reduce his wife's estate into his possession, it came to be the practice of the court to require him, as a condition of obtaining equitable relief, to make a suitable settlement upon the wife out of her property. This practice illustrates in the most striking way the maxim, "He who seeks equity must do equity." Similarly, where the wife's property is in

²⁶ *Hood-Barrs v. Heriot*, (1896) A. C. 174 (Eng.); *Pike v. Fitzgibbon*, L. R. 17 Ch. Div. 454 (Eng.).

²⁷ *Tullet v. Armstrong*, 1 Beav. 1, 22, 4 Mylne & C. 377, 392 (Eng.).

any way under the control of the court of equity, the husband cannot remove it from such control without making provision for the wife.²⁸

143. Interests arising from equitable conversion.—We have already noticed, in connection with the effect of a valid contract for the purchase and sale of land, one instance of what is known as equitable conversion—which, by the way, has nothing whatever to do with “conversion” in the law of torts. The vendor’s interest, though he retained the legal title to the land, is considered as personalty, and goes on his death to his administrator or executor; while the vendee’s interest in equity is considered to be land and goes to his heir or devisee.²⁹ Conversion may also be effected by directions in a written instrument—most generally, in this country, in a will. A devises land with a direction—either explicit or gathered from the general purposes of the devise—to a trustee or executor to sell the land and pay the proceeds to B. B is considered by equity to have received a gift of money from A, not of land; therefore if B dies before the sale is made, the proceeds of the sale are payable, not to B’s heir or devisee, but to his executor or administrator. Again, A bequeaths a sum of money, with directions to trustees that they invest it in land and convey the land to B. B is considered in equity to have received a devise of land; so that if he dies before the lands are actually purchased, his heirs or devisees take, and not his personal representatives. It should be noted,

²⁸ *Lady Elibank v. Montolieu*, 5 Ves. 737 (Eng.); *Salter v. Salter*, 80 Ga. 178, 4 S. E. 391, 12 Am. St. Rep. 249.

²⁹ See § 36; *Wheless v. Wheless*, 92 Tenn. 293, LEADING ILLUSTRATIVE CASES.

however, that the direction to sell or invest, as the case may be, must be imperative in order to have this effect; if the question whether the sale or investment shall take place is left to the discretion of the trustee or executor, there is no implied or equitable conversion.³⁰ The doctrine of conversion is summed up in the somewhat vague maxim, "Equity looks upon that as done which ought to be done."³¹

144. **Reconversion.**—The person for whose benefit land is directed to be converted into money, or money into land, may prefer to take the property in its original form. This he may do, if he be *sui juris*, at his election:³² or if he be an infant, the court may elect for him if that be to his advantage.³³ This process is called reconversion. The election to retain the land as land, however, will not be permitted against the consent of co-owners who prefer a sale; since the sale of an undivided interest in land is usually disadvantageous, not realizing the full proportionate value of the interest.³⁴

145. **Administration of estates of decedents.**—The administration of the estates of decedents formed what was perhaps the most important part of the business of the English courts of chancery,

³⁰ Fletcher v. Ashburner, 1 Bro. Ch. 497 (Eng.), 1 Scott, Cases on Equity, p. 606; Prentice v. Janssen, 79 N. Y. 478, 1 Scott, Cases on Equity, p. 639, H. & B. 163; Craig v. Leslie, 3 Wheat. 563 (U. S.), 1 Scott, Cases on Equity, p. 611, H. & B. 39.

³¹ See § 227.

³² Bank of Ukiah v. Rice, 143 Cal. 265, 76 Pac. 1020, 101 Am. St. Rep. 118; Prentice v. Janssen, 79 N. Y. 478, 1 Scott, Cases on Equity, p. 639, H. & B. 163.

³³ Seeley v. Jago, 1 P. Wms. 389 (Eng.), 1 Scott, Cases on Equity, p. 635.

³⁴ Fletcher v. Ashburner, 1 Bro. C. C. 497, 500 (Eng.), 1 Scott, Cases on Equity, p. 606.

owing to the very limited powers of the courts of probate and the inadequacy of common-law remedies. In this country, however, in every state, the greater part of the business of administration has been committed by statute to the probate courts; and a large part of the rules which these courts administer—for example, on the subjects of legacies and of the marshalling of assets—is of equitable origin. In nearly all the states, however, there are subjects omitted from the statutes which compel an appeal to equity jurisdiction with greater or less frequency. There is such great variety in the probate and administration laws of the different states that it is impossible to lay down any general rules as to the extent of American equity jurisdiction on this subject.³⁵ A frequent cause for the interposition of equity, to give one example, is the bill by judgment creditors of the deceased to reach and bring into the estate property conveyed by the deceased in fraud of his creditors: for the executor or administrator, in many states, does not represent the creditor, but is considered to stand in the shoes of the deceased, and therefore cannot set aside a conveyance which the deceased himself could not avoid.³⁶ Again, in nearly every state the administration of trusts created by a will is considered within the exclusive jurisdiction of courts of equity.

146. Jurisdiction over infants.—Another part of the business of courts of chancery, of great impor-

³⁵ See 3 Pomeroy, *Equity Jurisprudence* (3d ed.), § 1154, for an exhaustive collection of the decisions in each state.

³⁶ *McDonald v. Aten*, 1 Ohio St. 293.

tance in England but of comparatively slight importance in this country, is the jurisdiction over infants. Whenever an infant is brought before the equity court as a party to any proceeding, he becomes a "ward of the court."³⁷ The court then appoints a guardian, if none has already been appointed. The court also may remove an infant from the custody of his father or mother or other guardian when the parent or guardian is morally unfit, or negligent of the child's education, or is endangering the infant's property.³⁸ The court exercises a careful control over the guardian's management of the infant's property, and through the guardian sees to it that the infant receives an education, moral and religious as well as intellectual, suited to his station in life. The English court even exercises a strict control over the marriage of its infant ward; such marriage, without the consent of the court, is a most serious contempt, even if the parents of the infant are living.³⁹ The guardianship of infants, like the administration of decedents' estates, is minutely regulated by statute in all the states of this country, and usually committed to the probate courts; but the jurisdiction of equity is occasionally invoked for special purposes.

147. Jurisdiction over lunatics and idiots.—The jurisdiction to adjudge a person to be a lunatic or idiot and appoint a committee belonged to the chancellor as an officer of the crown rather than to the

³⁷ *McGowan v. Lufburrow*, 82 Ga. 523, 14 Am. St. Rep. 178, 9 S. E. 427.

³⁸ *Richards v. Collins*, 45 N. J. Eq. 283, 14 Am. St. Rep. 726, 17 Atl. 831.

³⁹ 3 Pomeroy, *Equity Jurisprudence* (3d ed.), §§ 1308-1310.

court of chancery. Courts of equity in this country, therefore, do not profess to have such a jurisdiction, unless it has been conferred upon them by statute. The subject of lunatics and idiots, in this country, is regulated by legislation.⁴⁰

⁴⁰ Hughes v. Jones, 116 N. Y. 67, 22 N. E. 446, 15 Am. St. Rep. 386, 5 L. R. A. 637.

CHAPTER X.

MORTGAGES.

148. **Mortgages—English common law and equity theory.**—A mortgage at common law was a conveyance of the legal estate by A, the mortgagor, to B, the mortgagee, subject to the condition that if, on a prescribed day A paid B a sum of money, the legal estate immediately reverted in A. If, however, A allowed the pay day to pass without tendering the amount due, B's estate became absolute, and all right of A's to recover the land was entirely forfeited. The harshness of this result caused equity to interfere, about three centuries ago, with its characteristic invention, the Equity of Redemption. Equity gave A the right, enforceable by suit, to pay the amount due at a later date than the prescribed day, and on such payment compelled B to deed back the land to A. This right came to be regarded as creating in A the substantial interest in the land, an equitable estate—also called the equity of redemption,—which passed on A's death to his heirs. The equity courts, however, scrupulously recognized, in form, the legal right of B, the mortgagee, growing out of his ownership of the legal estate, to the possession of the property. B, therefore, was entitled to take possession of the land and to receive the rents and profits as soon as the mortgage was executed (unless the right to possession was reserved

to A in the instrument), or at any other time until the land was redeemed by payment of the debt; and equity would not interfere with his possession. Furthermore, B, as the party entitled to possession, was the only one who could recover the land from a third person. Equity, however, regarding the mortgagor's right as the substantial interest in the land, and B, the mortgagee, as holding his legal estate merely as security for the debt, compelled B when in possession to account for the rents and profits which he received, and to apply them in part payment of the interest on and the principal of the mortgage debt. B, therefore, might extinguish the debt, little by little, by going into possession. He was not limited to this method, however. He might, after the debt was due, bring a suit for foreclosure of—i. e., for cutting off or putting an end to—the equity of redemption. In such a suit the court, after ascertaining what was due to the mortgagee, gave the mortgagor a limited time—say six months—in which to make payment: and decreed that in default of such payment A's equity of redemption should be at an end. This sort of foreclosure practically consisted in removing from B's legal estate the cloud created by A's equity of redemption.⁴¹

149. American theories—Title theory states.—Under the English system we see the legal and the equitable conception of the mortgage existing side by side, neither having any influence whatever upon the other. In America the equitable ideas about the mortgage relation have influenced the common law,

⁴¹ Pomeroy, Equity Jurisprudence, §§ 1179-1185.

courts and have been adopted by them to a greater or less extent. One group—composed of all the Eastern states except New York, of most of the Southern states, and of two or three of the Western states, notably Illinois,—has made less departure from the English theory than the other group. In these states the mortgagee, as a general thing, has no right of possession of the premises until the mortgagor has committed default—has allowed the pay day to go by without tendering the debt and interest. As between the mortgagor and mortgagee the mortgagee is clothed with the legal title, while as against the rest of the world the estate, both legal and equitable, is in the mortgagor, who is entitled to recover possession from third persons. This result is certainly illogical and confusing as compared either with the English system or with the system in the other states.⁴²

150. **Lien theory states.**—In the second group of states—composed of New York, nearly all the Western and some of the Southern states—the legal theory of the mortgage has been entirely abandoned. A mortgage creates no estate whatever in the mortgagee (though the mortgage instrument is still worded as a conveyance). The mortgagee has a mere equitable lien, enforceable like other liens, by equitable proceedings only, and foreclosure sale. This lien will be defeated and the mortgagor's legal estate become unencumbered, without need of a re-

⁴² Pomeroy, *Equity Jurisprudence*, § 1187; *Barrett v. Hinckley*, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331, H. & B. 557; *Shields v. Lozeau*, 34 N. J. L. 496, 3 Am. Rep. 256.

conveyance—since nothing has been conveyed—by a payment of the debt at any time before foreclosure sale. The mortgagee, having no estate, is not entitled to possession of the land after default; his only remedy is to sue at law to recover the mortgage debt, or in equity for a foreclosure.⁴³ By a seeming inconsistency, however,—of no great practical importance—the mortgagee who has lawfully obtained the possession is allowed to retain it until his debt is paid; since it would be rather absurd to allow the mortgagor to eject the mortgagee when the latter might immediately reply with a suit for foreclosure.⁴⁴

151. Foreclosure by sale.—The English method of foreclosure—by cutting off the mortgagor's equity of redemption and then leaving the mortgagee's legal estate absolute and free from claim, is called strict foreclosure, and is rarely adopted in this country: in the lien theory states, indeed, it would be wholly inconsistent with the theory of the mortgage there prevailing. Instead, we have foreclosure by judicial sale—the common way of enforcing all equitable liens. The court, after ascertaining the amount due upon the mortgage, orders a public sale of the premises. This sale passes to the purchaser thereat whatever title the mortgagor had at the time he executed the mortgage. If the property does not yield enough to pay the amount due, the difference, or deficiency, may be collected by means of a per-

⁴³ Pomeroy, *Equity Jurisprudence*, §§ 1188-1190. Also see cases, *McMillan v. Richards*, 9 Cal. 365, 407, 70 Am. Dec. 655; *Chick v. Willetts*, 2 Kan. 384, 391, *LEADING ILLUSTRATIVE CASES*; *Trimm v. Marsh*, 54 N. Y. 599, 13 Am. Rep. 623.

⁴⁴ *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519.

sonal judgment in the same suit against the mortgagor or other party liable for the debt. If the sale yields a surplus after paying the amount due to the mortgagee, and expenses, the court orders this surplus to be paid to the mortgagor or to any other party—for example, a judgment creditor of the mortgagor—who may have a claim superior to the mortgagor.⁴⁵

152. **When deeds are treated as mortgages.**—A mortgage, in equity, is a mere security for a debt; conversely, any deed that is intended by the parties merely as security for a debt will be treated in equity as a mortgage, no matter what its form. A conveys land to B: at the same time B agrees in writing that he will reconvey the land to A if A shall pay to B \$5,000 at or before a certain date. Is this transaction a mortgage, or only what it appears to be on its face—a conveyance with an option to repurchase, which like all options must be exercised within the time specified?⁴⁶ The test to determine the question is, does A owe B \$5,000, which B might sue A for in an action at law, and was this transaction intended as security for its payment? If it appears by the evidence that such was the case, the transaction, despite its form, is a mortgage, and A has the mortgagor's right to redeem after the specified date.⁴⁷ Even an absolute deed, without any writing giving the grantor a right to reconveyance, will be treated as a mortgage, if it was intended by the parties as

⁴⁵ Pomeroy, *Equity Jurisprudence*, § 1228.

⁴⁶ See § 26.

⁴⁷ *Russell v. Southard*, 12 How. 139 (U. S.), 13 L. Ed. 927; compare *Coyle v. Davis*, 116 U. S. 108, 6 Sup. Ct. 314.

security for a debt actually subsisting. The parties deliberately have chosen a deed to carry out their purpose, without any deception or imposition practiced by the grantee: the latter's fraud, in the view of equity, consists in attempting to make an unconscientious use of the legal title which he has obtained.⁴⁸ To guard against the danger of dissatisfied grantors attempting to have their deeds construed to be mortgages, the courts demand convincing proof that the deed was intended as security—was other than what it purported to be. We have in this doctrine, as in the doctrine relating to part performance of oral contracts, a bold application of the principle that the Statute of Frauds shall not be an instrument for committing a fraud.

153. Conveyance of the mortgaged premises.—The estate of the mortgagor, whether legal or equitable, may be conveyed by him to a third party, and, of course, the land still remain burdened with the mortgage. Now, suppose the land is not of sufficient value, when sold on foreclosure, to pay off the mortgage; it then becomes important to know who is liable for the mortgage debt. A, the mortgagor, of course remains personally liable to B, the mortgagee; he cannot rid himself of the responsibility by conveying the land to another. How about the grantee, C? If in the conveyance from A to C, the latter assumes payment of the mortgage, then C, as well as A, is liable to the holder of the mortgage. Further, by agreeing with A to pay the debt, C, as

⁴⁸ *Peugh v. Davis*, 96 U. S. 332, 24 L. Ed. 775; *Stinchfield v. Milliken*, 71 Me. 567, H. & B. 347; *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 671.

between these two, is primarily liable. The situation is, practically, that of suretyship. B, the creditor, may hold either A or C for the debt, at his option—C is primarily liable, A secondarily liable. A, therefore, occupies the position of surety, C that of principal debtor. Many of the incidents of the suretyship relation are involved. Thus, if B, the creditor, makes a binding agreement with C, the principal debtor, extending the time for payment, this, in accordance with a rule of the law of suretyship, discharges A from his liability.⁴⁹ The liability of C to B, the creditor-mortgagee, is based, in most states, on the rule that a contract by C with A for the benefit of B may be sued upon by B. This liability then, in these states, is a legal one; the mortgagee may, if he choose, sue C at law on his promise to assume the mortgage debt.⁵⁰ In other states C's liability is one recognized by equity alone, enforceable in the foreclosure suit.⁵¹

154. Assignment of the mortgage.—Since the mortgagee's interest in equity (or according to the lien theory states, his interest both in equity and in law) is a mere lien, and not an estate, it follows that it may be transferred without the formalities requisite for a conveyance of land. The conception that the mortgage is a mere security for the debt is carried out to its logical conclusion. Since the debt is the principal thing, an assignment of the debt

⁴⁹ *Calvo v. Davies*, 73 N. Y. 211, 215, 29 Am. Rep. 130; *Union Mut. Life Insurance Co. v. Hanford*, 143 U. S. 187, 12 Sup. Ct. 437, 36 L. Ed. 118; *Pomeroy*, *Equity Jurisprudence*, § 1206.

⁵⁰ *McKay v. Ward*, 20 Utah 149, 57 Pac. 1024, 46 L. R. A. 623.

⁵¹ *Green v. Stone*, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. Rep. 577.

carries with it the incident of the debt—viz.: the security. Thus, if B, the mortgagee, assigns to D the mortgage note, but retains in his possession the mortgage instrument, the beneficial use of the mortgage likewise passes to D. When the debt falls due, D may foreclose, treat B as trustee of the mortgage for his benefit, make B a party to the foreclosure suit, and have the full benefit of the mortgage. If B were to assign the note to D and the mortgage instrument to E, the same result would follow: E would take nothing of substantial value, but would hold the mortgage for D's benefit. Most American states go still further. Suppose the mortgage secures a promissory note, and this note is subject to some defense, e. g., fraud, so long as it is in the hands of the original payee, B. B, of course, by indorsing the note to a bona fide purchaser, D, for value and before maturity, confers on D a title to the note free from such defense; by the cardinal rule of the law of negotiable paper, A, the maker, cannot set up against D the defense that he might have set up against B. Now the prevailing rule applies the same element of negotiability to the mortgage which secures the note. D, in the case supposed, cannot only sue on the note, but may foreclose the mortgage, free from A's defenses which would have been available against B.⁵² This rule, by which a mortgage securing a negotiable note itself becomes a species of negotiable instrument, was not established without protest, and is still denied in a few states.⁵³

⁵² *Carpenter v. Longan*, 16 Wall. 271 (U. S.), 21 L. Ed. 313.

⁵³ *Baily v. Smith*, 14 Ohio St. 396, 84 Am. Dec. 385; *Pomeroy*, *Equity Jurisprudence*, § 1210, note.

155. No mortgage without right of redemption.

—Not long after the courts of equity invented the equity of redemption, they were called upon to defend it by the further rule that the mortgagor cannot, when he executes the instrument, bargain away, either wholly or partially, his right of redemption. Thus, if A, the mortgagor, stipulates in the mortgage that he shall have no right to redeem after the pay day; or that his heirs may redeem but his assigns may not;⁵⁴ or that the mortgagee may have the option to buy an absolute title on payment of a bonus and thus cut off the equity of redemption; all such stipulations limiting the right of redemption are wholly void.⁵⁵ The reason is plain; if such stipulations were permitted to have effect, they would come into common use, and thus the entire system of equity mortgage law would in practice be destroyed and the mediaeval common law system restored in full vigor. This doctrine is expressed in the sentence, "Once a mortgage, always a mortgage." The wording of this maxim is somewhat misleading; in place of "always," it were better to read, "in all respects" a mortgage. For, on the other hand, it is quite legitimate for the mortgagor, by an independent transaction, after the mortgage is executed, to sell his equity of redemption to the mortgagee.⁵⁶ Such a sale, however, will be closely scrutinized by a court of equity and will not be permitted to stand unless it is perfectly fair; since the mortgagee, while

⁵⁴ Howard v. Harris, 1 Vern. 33 (Eng.).

⁵⁵ Noakes & Co. Ltd. v. Rice, (1902) App. Cas. 24 (Eng.), LEADING ILLUSTRATIVE CASES.

⁵⁶ Pritchard v. Elton, 38 Conn. 434.

not in a strict fiduciary relation with the mortgagor, is in a position to take advantage of his necessities and to exert undue pressure upon him.⁵⁷

156. **Who may redeem from the mortgage.**—The mortgagor or his heir, devisee, or grantee of the land, may, as we have seen, redeem,—i. e., buy back the land,—if necessary, by a suit in equity for the purpose—at any time before foreclosure sale. The same right of redemption extends to any person who has an interest in the land to protect: such as the mortgagor's widow, his grantee of a portion of the land, subsequent mortgagees or judgment creditors, and the like. The mortgage, however, cannot be redeemed by piecemeal, against the mortgagee's consent. If C has an interest worth \$100 in land subject to a prior mortgage of \$1,000 C can free his interest from the mortgage only by paying the whole mortgage debt;⁵⁸ and he cannot compel the mortgagor or holders of other interests to contribute to the burden of redeeming.⁵⁹

157. **Subrogation.**—The last rule would seem to be a hardship on persons who wish to protect a comparatively small interest in the land. Suppose C owns a one-third interest in land, there being a \$3,000 mortgage on the whole land, made by A, mortgagor, to B, mortgagee. We have just seen that to avoid foreclosure, C must pay off the whole mortgage. Now it is obviously just that he should have some right of contribution against A, whom he

⁵⁷ *Villa v. Rodriguez*, 12 Wall. 323 (U. S.), 20 L. Ed. 406.

⁵⁸ *Gibson v. Crehore*, 5 Pick. 146 (Mass.); *McGough v. Sweetser*, 97 Ala. 361, 12 South. 162, 19 L. R. A. 470.

⁵⁹ *Pomeroy*, Equity Jurisprudence, § 1220.

has just benefited to the extent of \$2,000. Must C be confined to a personal action against A, and take his chances with A's other creditors? Equity has invented an ingenious piece of legal machinery to meet this emergency. C, by his payment, in self defense, of A's \$2,000 debt, becomes "subrogated,"—i. e., substituted—to all the original remedies and securities which the creditor, B, held against A. Although the mortgage is paid off and legally discharged, equity keeps it alive for C's benefit to the extent of his claim: C, in effect, becomes an equitable assignee of the mortgage and may foreclose against A for \$2,000.⁶⁰

Again, take the case where C, the grantee of the mortgagor, A, assumed the mortgage debt. C, as we have seen, is now the party primarily liable for the debt, and A is surety. Now if the mortgagee collects the debt from A, A may demand that the mortgage be kept alive for his benefit, so that he may foreclose and thus secure his reimbursement by C, the principal debtor.⁶¹

158. Same subject.—This principle of subrogation, by which a person paying off another's debt is entitled (with some limitations) to the benefit of the creditor's securities, is of wide application, and is not confined to the law of mortgages. As in the second example given, it applies to all persons secondarily liable for a debt or duty—such as sureties—who discharge the debt or duty in place of the one

⁶⁰ Ellsworth v. Lockwood, 42 N. Y. 89, 97.

⁶¹ Rice v. Sanders, 152 Mass. 108, 24 N. E. 1079, 23 Am. St. Rep. 804,

8 L. R. A. 315.

primarily liable.⁶² As in the first example, it applies to persons who, though not legally bound to pay, are obliged to pay in order to protect their own interest. It also applies where a person under no legal or practical compulsion pays off the debt at the request of the debtor; he also succeeds by subrogation to the benefit of the creditor's mortgage or other security.⁶³ It does not apply, however, to the mere volunteer or intermeddler. One who has no interest to protect or duty to perform cannot, by his unsolicited favor to the debtor party, become entitled to the benefit of subrogation.⁶⁴

159. **Marshalling of securities.**—The maxim, "He who seeks equity must do equity," applies in foreclosure suits as in other equitable remedies. In particular, the mortgagee or lien holder will not be permitted to exercise his right to foreclose in such a way as to inflict a needless or wanton injury upon third persons. Suppose A has mortgaged to B, for \$1,000, two parcels: X, worth \$1,200, and Y, worth \$1,000. Afterwards A mortgages parcel X to C for \$800. Now if B is permitted to enforce his mortgage by a sale of X alone, there will not be enough surplus to satisfy C's mortgage. If, then, it is just as convenient for B to get satisfaction out of parcel Y, he will not be permitted to go against X until Y is used up. If B does sell X first, to the exclusion

⁶² *Darrow v. Summerhill*, 93 Tex. 92, 53 S. W. 680, 77 Am. St. Rep. 833; *Pace v. Pace's Administrator*, 95 Va. 792, 30 S. E. 361, 44 L. R. A. 459 (subrogation of surety against co-surety).

⁶³ *Amick v. Woodworth*, 58 Ohio St. 86, 50 N. E. 437; *Crippen v. Chappel*, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187.

⁶⁴ *Pomeroy, Equity Jurisprudence*, § 1212.

of C, the latter will be substituted or subrogated to B's rights against parcel Y, and thus get payment in full. B, of course, being the prior lien holder, must not be deprived of his right to get satisfaction in full from one parcel or the other.⁶⁵

160. Foreclosure where land has been sold in successive parcels.—A very common situation arises when the mortgaged land has been divided up into lots, and these lots sold, at different times, to different purchasers. A, having mortgaged land divided into four lots to B, sells lot No. 1 to C and retains the rest. Now if the sale to C was by warranty deed, that amounts to an agreement between A and C that the land retained by A—lots 2, 3 and 4—should bear the mortgage rather than lot 1 which is sold. A now sells lot 2 to D in a similar way. The result of the two transactions is, that the lots now retained by A, Nos. 3 and 4, should bear the mortgage first, then lot 2, then lot 1. So, when all the lots are sold, in the order 1, 2, 3, 4, they are liable for the mortgage, when the rights of all the parties come to be finally adjusted, in the order 4, 3, 2, 1,—the opposite or inverse order of the sales. This is the “inverse order of alienation” rule. If the mortgagee is in no way delayed or impeded in the collection of his debt thereby, he must follow this inverse order in conducting the foreclosure sale. If he does not—if for example he gets satisfaction from 4, 3 and 1, when 4, 3, and 2 would have answered his purpose

⁶⁵ Aldrich v. Cooper, 8 Ves. 382, 395 (Eng.); Wyman v. Fort Dearborn National Bank, 181 Ill. 279, 72 Am. St. Rep. 259, 48 L. R. A. 565, 54 N. E. 946; Farwell v. Bigelow, 112 Mich. 285, 70 N. W. 579.

as well, the owner of 2 may be compelled to make good the loss to the owner of 1.⁶⁶

⁶⁶ Lyman v. Lyman, 32 Vt. 79, 76 Am. Dec. 151; Howser v. Cruikshank, 122 Ala. 256, 25 South. 206, 82 Am. St. Rep. 76.

CHAPTER XI.

EQUITABLE LIENS—ASSIGNMENTS.

161. **Equitable liens.**—It has been stated⁶⁷ that the mortgage, in many states, is looked upon as creating an equitable lien merely. An equitable lien has nothing in common with a common law lien, except that each is a form of securing the payment of a debt or performance of a duty. A common law lien is a right to retain possession of a chattel for such purpose. The holder of an equitable lien, on the contrary, has no right of possession. His right is to bring an equitable suit which results in a judicial sale of the land or chattel for the purpose of satisfying his demands. Like a trust or other equitable right over property, it remains attached to the property until the latter comes into the hands of a bona fide purchaser for value without notice. Also, the lien holder's demand being a secured claim, it must be paid from the proceeds of the foreclosure sale of the property in preference to the claims of unsecured creditors.⁶⁸

162. **Equitable liens, how created.**—An equitable lien is created by any express agreement in writing that designated property shall be security for a debt or obligation; or in cases of personal property, the lien may be created orally.⁶⁹ The form of the agreement is immaterial. An agreement to give a mort-

⁶⁷ See § 150; *Davis v. Clay*, 2 Mo. 130, *LEADING ILLUSTRATIVE CASES*.

⁶⁸ *Pomeroy*, *Equity Jurisprudence*, §§ 1233, 1234.

⁶⁹ *Hauselt v. Harrison*, 105 U. S. 401, 26 L. Ed. 1075; *Perry v. Board of Missions*, 102 N. Y. 99, 6 N. E. 116.

gage creates a lien,⁷⁰ just as an agreement to convey land creates an equitable estate in the vendee, in accordance with the maxim, "Equity looks on that as done which ought to be done."⁷¹ A mortgage which is defective in form—which, for example, is unsealed, so that it cannot (in many states) operate as a conveyance of the land, is nevertheless treated as a lien.⁷² A lien is also created when specific property is devised or bequeathed by will, charged with the payment of debts or of legacies; the lien so created is usually called a "charge."⁷³

163. **Vendor's lien.**—The vendor who has contracted to convey land on payment of the purchase price, as we have already seen, holds the legal title as security for such payment. This is sometimes called the vendor's lien; but his situation is more like that of the English mortgagee, as he has the legal title. He may have foreclosure;⁷⁴ his rights are assignable; and if he assigns the notes given for the purchase price, this assignment carries with it the security of the lien,⁷⁵ just as the assignment of a mortgage note operates to assign the benefit of the mortgage.

164. **The vendor's or grantor's lien after conveyance.**—The vendor's hold upon the land, by way of

⁷⁰ Daggett v. Rankin, 31 Cal. 321.

⁷¹ See §§ 36, 227.

⁷² Atkinson v. Miller, 34 W. Va. 115, 11 S. E. 1007, 9 L. R. A. 544, 1 Scott, Cases on Equity, p. 308.

⁷³ Clift v. Moses, 116 N. Y. 144, 22 N. E. 393.

⁷⁴ Button v. Schroyer, 5 Wis. 598, 1 Ames, Equity Jurisdiction Cases, p. 225; Lewis v. Hawkins, 23 Wall. 119 (U. S.), H. & B. 665.

⁷⁵ Graham v. McCampbell, Meigs 52 (Tenn.), 33 Am. Dec. 126, 1 Ames, Equity Jurisdiction Cases, p. 205. See §§ 37, 154.

lien, is not necessarily at an end when he has conveyed the land to the vendee. In England and in half the states the vendor—now become a grantor—who has not received full payment of the purchase price has a lien, implied by equity, to secure such payment. This lien is also generally called the vendor's lien, but it is so different in all respects from the lien mentioned in the last paragraph that it should receive a different name. Since it is a secret lien, not declared in the deed but implied from the fact that the purchase price has not been paid, it has received scant favor from the courts: has been subject to many arbitrary restrictions, and in half the states has been rejected by the courts or legislatures. In those states where it exists, however, it is of great practical importance.⁷⁶

165. **Same subject.**—On nearly every proposition that has been advanced with respect to this lien there is a difference of opinion in the various states. The following rules, however, are supported by the majority in each instance. The grantor may readily lose or waive the lien by taking other security, even though that security turns out to be worthless.⁷⁷ It is waived, for example, by his taking a mortgage from the grantee,⁷⁸ or by taking the note or bond of a third person, or the grantee's note indorsed by a third person.⁷⁹ The lien does not exist to secure any claim other than a certain and definite

⁷⁶ For the various theories on which this lien has been rested, see Pomeroy, *Equity Jurisprudence*, § 1250.

⁷⁷ *Kendrick v. Eggleston*, 56 Iowa 128, 41 Am. Rep. 90, 8 N. W. 786.

⁷⁸ *Avery v. Clark*, 87 Cal. 619, 25 Pac. 919, 22 Am. St. Rep. 272.

⁷⁹ *Rice v. Rice*, 36 Fed. 858.

amount due as purchase price; for instance, where the grantor conveys land on consideration that the grantee shall support him for the rest of his life (a very common transaction), there is no lien implied to secure the performance of the grantee's promise, or damages for its breach.⁸⁰ The lien is personal to the grantor, according to the prevailing view: that is to say, it cannot, like a mortgage or other lien, be assigned: it does not pass on assignment of the debt, and a person paying it off is not entitled to be subrogated to the lien.⁸¹ Like other liens, however, it is good against a purchaser from the grantee who has notice of the lien, or against volunteers,—i. e., the grantee's heirs, devisees, or donees.⁸²

166. Grantor's reserved lien.—In a good many states it is a common practice to stipulate in the deed that the grantor has a lien for the purchase price. Such lien resembles an ordinary lien, or the mortgage in a lien-theory state; it is not subject to the rules which restrict the operation of the grantor's implied lien. It is not waived merely by taking other security; it may be assigned, and passes on assignment of the purchase money note.⁸³

167. Summary—Methods of securing purchase price of land.—There are, then, four methods in common use of securing the purchase price of land:
1. The vendor may convey and take back a purchase

⁸⁰ *Peters v. Tunell*, 43 Minn. 473, 45 N. W. 867, 19 Am. St. Rep. 252.

⁸¹ *Baum v. Grigsby*, 21 Cal. 172, 81 Am. Dec. 153; *Wellborn v. Williams*, 9 Ga. 86, 52 Am. Dec. 427.

⁸² *Mackreth v. Symmons*, 15 Ves. 329 (Eng.), 1 Scott, Cases on Equity, p. 71; *Woodall v. Kelly*, 85 Ala. 368, 5 South. 164, 7 Am. St. Rep. 57.

⁸³ *Ober v. Gallagher*, 93 U. S. 199, 23 L. Ed. 829. See *Pomeroy*, Equity Jurisprudence, §§ 1255-1259.

money mortgage. 2. He may retain the legal title, his situation then resembling the English mortgagee. 3. He may convey and reserve a lien in the deed: he then resembles the mortgagee in the lien-theory states. 4. He may convey and, in half the states, rely on the lien which equity raises for his benefit.

168. **Equitable interests arising from assignments.**—In the earlier days of its history, equity had an important jurisdiction growing out of the assignment of ordinary choses in action; but as the validity of such assignments has long been recognized by the law courts, this jurisdiction is now obsolete. Certain species of assignments, however, are still within the exclusive domain of equity. Thus, A is holding a fund that belongs to B. B gives to C an order upon A for the fund, or part of it. At law, unless A gives his assent to this order and promises to pay, C can maintain no action against A. Equity, however, holds that by giving the order or making the assignment, B has transferred a property right in the fund to C, which C may now enforce by suit in equity against A, independently of any assent by A.⁸⁴

169. **Assignment of future interests.**—At common law, the power to make a transfer of future interests in land which should operate to convey the title, and not merely as a contract to convey, was very limited; and the power to make a sale of personal property not yet acquired was almost non-existent. The attitude of equity in those matters

⁸⁴ Pomeroy, *Equity Jurisprudence*, §§ 1280-1284; *Row v. Dawson*, 1 Ves. Sr. 331 (Eng.); *Brill v. Tuttle*, 81 N. Y. 454, 37 Am. Rep. 315; *Wheatley v. Strobe*, 12 Cal. 92, 73 Am. Dec. 522.

was, and is, very liberal. A, the heir of B, expects to inherit B's land on the latter's death. This is a mere hope, or expectancy (as it is technically called) and not a legal or equitable interest of any kind; for B, of course, is at liberty to disinherit A if he sees fit. A present transfer by A to C of this expectancy will not, on B's death, pass any legal title to C. It will, however, if on an adequate consideration, pass a title to C, on B's death, which equity will recognize, and which equity will enforce by compelling A to convey to C the legal estate.⁸⁵ Similarly, one who expects to receive a devise or legacy under the will of a person still living, may make a present transfer thereof which will take effect in equity, but not at law, upon the death of the testator.⁸⁶

170. Sale or mortgage of after acquired personal property.—A sale of chattels which the vendor does not own passes no property in the chattels at common law when the vendor subsequently acquires them. In equity, however, effect will be given to such sale. A mortgage on chattels not yet acquired confers an equitable lien upon the mortgagee as soon as the chattels come into the ownership of the mortgagor.⁸⁷ So, also, with a mortgage of the future rolling stock of a railroad.⁸⁸ The as-

⁸⁵ *Hobson v. Trevor*, 2 P. Wms. 191 (Eng.), 1 Scott, Cases on Equity, p. 75; *In re Garcelon's Estate*, 104 Cal. 570, 38 Pac. 414, 43 Am. St. Rep. 134, 32 L. R. A. 595, 1 Scott, Cases on Equity, p. 77.

⁸⁶ *In re Wilson's Estate*, 2 Pa. St. 325.

⁸⁷ *Holroyd v. Marshall*, 10 H. L. Cas. 191 (Eng.); *Smithurst v. Edmunds*, 14 N. J. Eq. 408. This rule, however, has been a good deal cut into in many states by the chattel mortgage acts, designed for the protection of creditors of the mortgagor.

⁸⁸ *Morrill v. Noyes*, 56 Me. 458, 471, 96 Am. Dec. 486.

signment of wages to be earned under an existing employment⁸⁹ or of payments to become due under an existing contract,⁹⁰ passes an interest which will be enforced in equity.

⁸⁹ *Mallin v. Wenham*, 209 Ill. 252, 101 Am. St. Rep. 233, 70 N. E. 564.

⁹⁰ *Ruple v. Bindley*, 91 Pa. St. 296. See, also, *Tailby v. Official Receiver*, L. R. 13 App. Cas. 523 (Eng.).

GENERAL PRINCIPLES AND DOCTRINES OF EQUITY

CHAPTER XII.

DOCTRINES RELATING TO ACCIDENT, MISTAKE, AND FRAUD.

171. **Accident, mistake, and fraud.**—In discussing equitable remedies and equitable rights of property or rights analogous to property, we have frequently had occasion to refer to fraud⁹¹ as giving rise to various equitable remedies—such as cancellation, reformation, injunction—or to constructive trusts. We have also referred to mistake⁹² and accident.⁹³ These three things—fraud, mistake, and accident—frequently are the occasion for legal remedies; the remedies by which equity copes with them, however, are more numerous and efficient. The equitable conception of fraud is very much broader than the meaning attached to the word by the common law, and requires some explanation. Mistake has, perhaps, already been sufficiently illustrated. The topic of accident is of limited importance, and may be disposed of briefly.

172. **Accident.**—Equity takes jurisdiction, within somewhat narrow limits, to relieve a person who

⁹¹ See §§ 65, 66, 68, 73, 78, 80, 64, etc.

⁹² See §§ 67-81.

⁹³ See § 64.

has incurred a legal loss or liability through accident, without fault or negligence on his own part. A conspicuous instance, already noted, is that of a judgment obtained against a defendant who was prevented by accident from setting up a good defense.⁹⁴ Another instance is that of a forfeiture incurred by accident.⁹⁵ In general, however, if a party fails to perform a contract because of an unavoidable accident, neither law nor equity will relieve him from the consequences; he should have guarded against the possibility of accident by an express stipulation in the contract.⁹⁶ Probably the most common of the few instances of the jurisdiction is the suit in equity to recover the amount due on a written instrument that is lost or destroyed. This suit arose from the facts that the common law procedure, in an action on a bond or sealed instrument, required the instrument to be produced; while an action on a negotiable instrument—a bill, note, or check—which had been lost could not be maintained, because the common law procedure provided no machinery for indemnifying the defendant in case he should be obliged to pay a second time. The equity procedure was not subject to these defects. Jurisdiction to recover on lost sealed or negotiable instruments in equity became well established;⁹⁷ and, by the weight of authority, has been extended to lost written in-

⁹⁴ See § 64.

⁹⁵ See § 190; *Kopper v. Dyer*, 59 Vt. 477, 9 Atl. 4, 59 Am. Rep. 742, H. & B. 166, 1 Scott, Cases on Equity, p. 400.

⁹⁶ *Pomeroy*, Equity Jurisprudence, § 826.

⁹⁷ *Ex parte Greenway*, 6 Ves. 812 (Eng.), 1 Scott, Cases on Equity, p. 413; *Patton v. Campbell*, 70 Ill. 72, H. & B. 171; *Savannah Nat. Bank v. Haskins*, 101 Mass. 370, 3 Am. Rep. 373.

struments that are neither sealed nor negotiable.⁹⁸ The defects in the common law procedure have been remedied by statute, so that actions may now be brought on lost or destroyed instruments; but the remedy in equity still remains, in accordance with the principle that a jurisdiction in equity which has once existed is not lost because courts of law have acquired power to entertain actions for similar relief.⁹⁹

173. Fraud, actual and constructive.—A famous classification of frauds in equity was made by the great Chancellor, Lord Hardwicke, in the eighteenth century.¹ He divided frauds into four forms: 1. Actual frauds or impositions, which again may be subdivided into false representations and concealments. 2. Frauds apparent from the nature of the bargain or transaction. 3. Frauds presumed from the circumstances of the parties. 4. Frauds on third persons not parties to the transaction. The last three are called by the somewhat vague term, constructive frauds. The last class is made up of frauds on creditors; inasmuch as the definition of such frauds is very much the same in equity as in law, we may dismiss this class with the reminder that the creditors' bill is the usual remedy for coping with them.² The elements which go to make up the false representations which will be a ground in equity for rescission or cancellation, or a defense to specific performance, are also practically the same as at com-

⁹⁸ *Reeves v. Morgan*, 48 N. J. Eq. 415, 21 Atl. 1040.

⁹⁹ See § 231.

¹ *Earl of Chesterfield v. Janssen*, 2 Ves. Sr. 125 (Eng.), 1 Atk. 301, 1 Scott, Cases on Equity, p. 455.

² See § 96.

mon law, with one very important exception. As at law, the false representation must be a statement of a fact, not the expression of an opinion; made with the intention or expectation that it be acted upon; must be material; that is, must result in damage to the other party; while the other party must have relied upon it, and not upon his own information.³ The great point of difference, as has already been pointed out, is that the misrepresentation may be a ground for relief in equity though it was entirely innocent—though the party making it had full belief in its truth. His fraud or moral culpability, in equity, consists in seeking to retain the advantage gained by his false representation after discovering its untruth.⁴

174. Concealment and non-disclosure.—The mere fact that a party entering into a contract fails to disclose facts, known to him but unknown to the other party, which make the contract advantageous to him, is not (with few exceptions) a ground for setting aside the contract in equity any more than it is ground for damages at law.⁵ A vendor who knows of facts rendering the thing sold worth less than the price offered, or a vendee who knows of facts rendering it more valuable, may—if the parties are dealing at arms' length—keep his own counsel; he is under no legal or equitable duty to disclose his

³ Pomeroy, *Equity Jurisprudence*, §§ 876-883, 890-898.

⁴ See § 19; *Summers v. Griffiths*, 35 Beav. 27 (Eng.), **LEADING ILLUSTRATIVE CASES**.

⁵ *Harris v. Tyson*, 24 Pa. St. 347, 3 Keener, *Equity Jurisdiction Cases*, p. 561; *People's Bank v. Bogart*, 81 N. Y. 101, 37 Am. Rep. 481, 3 Keener, *Equity Jurisdiction Cases*, p. 575; *Mitchell v. McDougall*, 62 Ill. 498, H. & B. 279.

secret knowledge. To be sure, his failure to disclose has frequently been held a defense to specific performance by American courts;⁶ but that particular remedy is one in which somewhat higher standards of conduct are required by the courts than are demanded by ordinary business ethics. The rule is otherwise if the party does more than keep silent—if he takes active measures to conceal the truth, or suppress the other's means of information, or even by trick or stratagem distracts the other's attention from the real facts; he is then guilty of fraudulent concealment, which is indistinguishable in its legal effects from fraudulent statements.⁷ *Aliud est celare, aliud tacere*, says the Latin maxim: it is one thing to conceal, another thing to keep silent.

175. Same subject—Non-disclosure by fiduciaries.—The rule is far otherwise in transactions between fiduciaries. It is of the very essence of a fiduciary relation that it must be characterized by the utmost good faith in the dealings between the parties. It is the duty, therefore, of a trustee dealing with his beneficiary, or an attorney with his client, or a confidential agent with his principal, or a guardian with his ward, to make the fullest and frankest disclosure of all facts known to him, bearing upon the transaction, which would make it advantageous to him or disadvantageous to the other. Such fiduciary relations, in order to impose this duty, need not be of a permanent or general char-

⁶ See § 20.

⁷ *Coaks v. Boswell*, L. R. 11 App. Cas. 232 (Eng.), 3 Keener, *Equity Jurisdiction Cases*, p. 596.

acter; the parties may occupy a position of trust and confidence solely for the purpose of the contract or transaction in question.⁸

176. Inadequacy of consideration.—Under the head of constructive frauds apparent from the nature of the transaction may logically be included the two topics: contracts upon an inadequate consideration, and transactions which are illegal or against public policy. The latter may conveniently be postponed for the present.

Inadequacy of consideration, pure and simple, as we have seen, is no defense to specific performance; much less is it a ground for setting aside a contract that has been performed.⁹ A man cannot rid himself of his bargain, either in equity or in law, simply because it is a bad bargain. The cases all agree, however, that inadequacy of consideration (if the transaction was not a gift) may, if very gross, be of itself convincing evidence of fraud.¹⁰ If a man sells land worth \$10,000 to a stranger for \$100, and it is certain that no gift or benefaction was intended, and there is no evidence one way or the other of the circumstances of the transaction, the court is at liberty to draw the inference of fact that the vendor was defrauded or imposed upon, and hence may set the

⁸ *Tate v. Williamson*, L. R. 1 Eq. 528 (Eng.), 2 Ch. 55, H. & B. 337; *Dolman v. Nokes*, 22 Beav. 402 (Eng.), 3 Keener, Equity Jurisdiction Cases, p. 565; *Brown v. Montgomery*, 20 N. Y. 287, 75 Am. Dec. 404, 3 Keener, Equity Jurisdiction Cases, p. 571; *People's Bank v. Bogart*, 81 N. Y. 101, 37 Am. Rep. 481, 3 Keener, Equity Jurisdiction Cases, p. 575.

⁹ *Seymour v. Delancey*, 3 Cow. 445 (N. Y.), 15 Am. Dec. 270, 2 Keener, Equity Jurisdiction Cases, p. 772; *Phillips v. Pullen*, 45 N. J. Eq. 5, 16 Atl. 9, H. & B. 308. See § 18.

¹⁰ *Coles v. Trecothick*, 9 Ves. 234, 246 (Eng.), 2 Keener, Equity Jurisdiction Cases, p. 768; *Falcke v. Gray*, 4 Drew. 651 (Eng.), H. & B. 655.

sale aside. It must be admitted that cases in which inadequacy of consideration alone, without any other inequitable element, has been the ground of relief, are in practice exceedingly rare. Usually we find something in the circumstances or condition of the parties which tends to render the transaction suspicious—such as mental weakness, ignorance, undue influence. Such additional facts, when combined with inadequacy of consideration, easily induce the court of equity to grant its relief to the party of whom advantage is taken.¹¹

177. Persons wholly or partially incompetent.—Instances of fraud presumed by equity from the circumstances of the parties are very numerous. The incompetency of married women and of infants to contract is governed in equity by the same rules as those at common law, with the exception of the married woman's contracts relating to her separate estate.¹² The same may be said of the rules defining insanity and idiocy. As in the law of wills, there may be a degree of mental weakness, not amounting to insanity or idiocy, which of itself will incapacitate a party in equity.¹³ A mere deficiency in mental ability does not necessarily invalidate a transaction if the party had sufficient intelligence to understand the nature of his acts;¹⁴ but if such mental deficiency is accompanied by undue influence or other inequitable conduct of the other party, equity will readily set the transac-

¹¹ See the following paragraphs.

¹² See §§ 140, 141.

¹³ *Davis v. Cummins*, 60 Vt. 502, 11 Atl. 727.

¹⁴ *Cowee v. Cornell*, 75 N. Y. 91, 99, 31 Am. Rep. 428, H. & B. 316.

tion aside.¹⁵ Even mere illiteracy or ignorance, if unfairly taken advantage of, has sometimes been the ground for setting aside a disadvantageous contract.¹⁶ Intoxication does not necessarily disable a person from contracting. To be sure, if the intoxication is brought about by the other party and taken advantage of by him, the fraud is palpable and will be relieved against.¹⁷ If the intoxication is not thus unfairly produced or used by the other, equity will not set the contract aside, although it was sufficient in degree to cloud the party's judgment;¹⁸ complete intoxication, however, whereby one is wholly deprived of his faculties and disabled from understanding his acts, renders the contract voidable.¹⁹ Persons who have made sacrifices under the pressure of financial or other distress have sometimes been relieved in equity where advantage was taken of their situation to drive a hard bargain, and they acted without an intelligent comprehension of the situation, or under undue pressure.²⁰

178. Expectant heirs and reversions.—With one class of persons, equity makes the assumption that their contracts are made under the pressure of pecuniary distress. This class is composed of heirs who, during the lives of their ancestors, sell or

¹⁵ *Allore v. Jewell*, 94 U. S. 506, H. & B. 320.

¹⁶ *Fish v. Leser*, 69 Ill. 394, H. & B. 650; *Green v. Wilkie*, 98 Iowa 74, 66 N. W. 1046, 60 Am. St. Rep. 184, 36 L. R. A. 434.

¹⁷ *Crane v. Conklin*, 1 N. J. Eq. 346, 22 Am. Dec. 519.

¹⁸ *Harbison v. Lemon*, 3 Blackf. 51 (Ind.), 23 Am. Dec. 376.

¹⁹ *Thackrah v. Haas*, 119 U. S. 499, 7 Sup. Ct. 311, 3 Keener, Equity Jurisdiction Cases, p. 699, 2 Scott, Cases on Equity, p. 746.

²⁰ *Neilson v. McDonald*, 6 Johns. Ch. 201 (N. Y.), 3 Keener, Equity Jurisdiction Cases, p. 751.

charge their expectant interests,²¹ or of reversioners who similarly deal with their future estates. Such persons are often exposed to great temptation to dispose of their expectant or future interests at a sacrifice. Equity has, therefore, established the general rule, that their contracts with reference thereto are voidable, unless made upon an adequate consideration—unless they receive the full market value of their interests.²² This is the rule of English equity, which has usually been followed by the comparatively few cases on the subject in this country.

179. **Duress and undue influence.**—Legal duress is a ground for cancellation or other appropriate equitable relief. Acts, also, which fall far short of the legal definition of duress have the same effect, under the heading, undue influence. This has been defined as “pressure of whatever character, whether acting on the fears, or the hopes, if so exerted as to overpower the volition without convincing the judgment.” What may amount to undue influence, of course, varies greatly with the circumstances and the individual. Much less may be required to overcome the volition of an aged invalid than of a person in robust health. In practice, then, the subject is bound up with the other matters—particularly mental weakness—which have been mentioned in the foregoing paragraphs.²³

²¹ As to the enforceability of such contracts in equity, see § 169.

²² *Fry v. Lane*, L. R. 40 Ch. Div. 312 (Eng.); *In re Garcelon's Estate*, 104 Cal. 570, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134.

²³ *Rau v. Von Zedlitz*, 132 Mass. 164, 3 Keener, Equity Jurisdiction Cases, p. 784, 1 Scott, Cases on Equity, p. 487; *Hollocher v. Hollocher*, 62 Mo. 267; *Haydock, Ex'rs. v. Haydock*, 33 N. J. Eq. 494, 3 Keener, Equity Jurisdiction Cases, p. 807.

180. Fiduciary relations—Transaction presumed invalid.—The undue influence spoken of in the last paragraph was actual; like any other fact, it must be proved by the person wishing to set aside the transaction. Now, if the relation between the parties was a fiduciary one, we have the important rule that every transaction between persons in such a relation, if assailed by the beneficiary or dependent party, is presumed to be invalid; the burden rests upon the trustee or quasi-trustee of proving that the transaction was in all respects fair and equitable, with full knowledge and free consent.²⁴ If A, a trustee, or quasi-trustee, or other person occupying a position of trust and confidence with reference to B, becomes the purchaser of B's property without B's knowledge or consent, then, obviously, he is unable to overcome the presumption, and the transaction is voidable at B's option, though A may have paid a fair price; and the same is true where A, with power to buy for B, purchases from himself.²⁵ If the transaction is a gift from B to A, the additional rule is established in England, and followed in many states, that B must be shown to have had the independent advice of a third person, or else the gift may be set aside by B.²⁶ These rules apply to all manner of fiduciary relations—to that of trustee and beneficiary,²⁷ of confidential agent and princi-

²⁴ *Ex parte Lacey*, 6 Ves. 625, 627 (Eng.); *Smith v. Townshend*, 27 Md. 368, 92 Am. Dec. 637.

²⁵ *Michoud v. Girod*, 4 How. 503 (U. S.); *Ex parte Bennett*, 10 Ves. 381, 394 (Eng.).

²⁶ *Allcard v. Skinner*, 36 Ch. Div. 145, 189 (Eng.); *Liles v. Terry*, (1895) 2 Q. B. 679 (Eng.), 3 Keener, Equity Jurisdiction Cases, p. 827, LEADING ILLUSTRATIVE CASES.

²⁷ See cases in notes 24 and 25.

pal,²⁸ of attorney and client,²⁹ of guardian and ward,³⁰ of parent and child.³¹ Moreover, they are not limited in their application to these well-defined relationships, but extend to all situations where one party in fact occupies a position of trust and confidence with reference to the other, and is therefore exposed to the temptation of exercising undue influence or of making an unfair profit.³² Such a relation often exists between a son and an aged dependent parent, or between other near relations;³³ between physician and patient;³⁴ between a pastor or spiritual adviser and a person under his religious influence;³⁵ between husbands and wives;³⁶ and partners.³⁷

181. Ratification and acquiescence.—A right of action to set aside a transaction for actual or constructive fraud may be lost by a ratification. To

²⁸ *Bentley v. Craven*, 18 Beav. 75 (Eng.), H. & B. 530; *Panama, etc., Tel. Co. v. Indiarubber, etc., Co.*, L. R. 10 Ch. 515, 526 (Eng.), 3 Keener, *Equity Jurisdiction Cases*, p. 550.

²⁹ *Elmore v. Johnson*, 143 Ill. 513, 32 N. E. 413, 36 Am. St. Rep. 401, 21 L. R. A. 366, H. & B. 343; *Dunn v. Dunn*, 42 N. J. Eq. 431, 7 Atl. 842, 3 Keener, *Equity Jurisdiction Cases*, p. 819.

³⁰ *Allfrey v. Allfrey*, 1 Mac. & G. 87 (Eng.), 1 Scott, *Cases on Equity*, p. 394; *Ashton v. Thompson*, 32 Minn. 25, 18 N. W. 918, 2 Scott, *Cases on Equity*, p. 703.

³¹ *Noble's Adm'r v. Moses*, 81 Ala. 530, 1 South. 217, 60 Am. Rep. 175; *Carter v. Tice*, 120 Ill. 277, 11 N. E. 529.

³² *Tate v. Williamson*, L. R. 1 Eq. 528, 2 Ch. 55 (Eng.), H. & B. 337; *Wakeman v. Dodd*, 27 N. J. Eq. 564.

³³ *Gillespie v. Holland*, 40 Ark. 28, 48 Am. Rep. 1.

³⁴ *Unruh v. Lukens*, 166 Pa. St. 324, 31 Atl. 110.

³⁵ *Allcard v. Skinner*, 36 Ch. Div. 145 (Eng.); *Connor v. Stanley*, 72 Cal. 556, 1 Am. St. Rep. 84, 14 Pac. 306 (spiritualist medium).

³⁶ *Hall v. Otterson*, 52 N. J. Eq. 522, 28 Atl. 907, 3 Keener, *Equity Jurisdiction Cases*, p. 401; *Brison v. Brison*, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189.

³⁷ *Colton v. Stanford*, 82 Cal. 351, 23 Pac. 16, 16 Am. St. Rep. 137.

have this effect, however, the ratification must be with full knowledge of the facts constituting the fraud, and of the party's rights; and in case of undue influence, the influence must have entirely disappeared.³⁸ Acts or conduct which fall far short of a formal ratification may have the same effect. Conduct which cannot be reconciled with an intention to repudiate, permitting the other party to deal with the property as his own or even a delay for a considerable length of time, after obtaining knowledge of the right to rescind the transaction, may operate as an acquiescence in the wrong, and so defeat the right to rescind.³⁹

182. Illegal contracts—In pari delicto rule.—It is a maxim both of law and of equity that a party in equal guilt (*in pari delicto*) with the other party cannot have a remedy against him. If, for instance, A gambles with B, and loses, and promises to pay his loss in money or land, B cannot sue for the money nor have specific performance for the land. Also, if A has already paid the money or conveyed the land, he cannot (unless permitted by statute) recover back the money or sue in equity to cancel the conveyance of the land.⁴⁰ The rule, however, is subject to some limitations and exceptions. If A, in the case supposed, has given B his promissory note

³⁸ *Crowe v. Ballard*, 3 Brown Ch. 117, 2 Cox 253 (Eng.), 2 Scott, Cases on Equity, p. 759.

³⁹ *De Bussche v. Alt*, L. R. 8 Ch. Div. 286, 314 (Eng.). See *Pomeroy*, Equity Jurisprudence, §§ 881, 917, 964, 965.

⁴⁰ *Batty v. Chester*, 5 Beav. 103 (Eng.), 3 Keener, Equity Jurisdiction Cases, p. 849; *Leonard v. Poole*, 114 N. Y. 371, 21 N. E. 707, 11 Am. St. Rep. 667, 4 L. R. A. 728, 2 Scott, Cases on Equity, p. 787; *Treadwell v. Torbert*, 119 Ala. 279, 24 South. 54, 72 Am. St. Rep. 918.

for the gambling debt, there is danger that this may be transferred to a bona fide purchaser before maturity and that A will thus lose his defense, illegality; or if A has entered into a written agreement, not negotiable, for the payment, there is the possibility of loss of evidence to prove the illegality of the consideration. Cancellation, therefore, will simply have the same result as successfully setting up the defense of illegality in an action at law on the instrument; the better view, therefore, is that the written evidence of an executory illegal contract may be cancelled, if the defense at law to a suit thereon is an inadequate remedy.⁴¹

183. **Same subject—Parties not in *pari delicto*.**—Equity may, however, come to the conclusion that one of the parties to the illegal transaction is not as guilty as the other, and that public policy is best promoted by aiding him to set the transaction aside. Thus, of the two parties to a usurious contract, the borrower is considered less to blame than the lender, and may have relief from his contract.⁴² Or, one party may have been led into the illegal contract, or compelled to perform it, by the duress, undue influence, or other fraud, actual or constructive, of the other party, and thus, because of his comparative innocence, be entitled to have the contract set aside as against the more guilty party.⁴³

⁴¹ *McCutcheon v. Merz Capsule Co.*, 71 Fed. 787, 19 C. C. A. 108, 31 L. R. A. 415; *Booker v. Wingo*, 29 S. C. 116, 7 S. E. 49.

⁴² *Bosanquett v. Dashwood*, Cas. t. Talb. 38 (Eng.), 2 Scott, Cases on Equity, p. 667; *Peters v. Mortimer*, 4 Edw. Ch. 279 (N. Y.).

⁴³ *Wright v. Stewart*, 130 Fed. 905, 921; *Gorringe v. Read*, 23 Utah 120, 63 Pac. 902, 90 Am. St. Rep. 692.

CHAPTER XIII.

ESTOPPEL—PENALTIES AND FORFEITURES— ELECTION—SATISFACTION.

184. **Certain general principles of equity.**—A number of general principles and doctrines run through the whole domain of equity jurisprudence and regulate the application of all equitable remedies. Most of these principles and doctrines have already been mentioned incidentally. Several of them are cast into the form of maxims. Among the others are the doctrine as to estoppel; as to penalties and forfeitures; as to election and as to satisfaction; and as to notice, priorities, and bona fide purchasers.

185. **Equitable estoppel.**—The conception of equitable estoppel or estoppel by conduct is a familiar one, having been long ago taken over by the common law from equity; but its applications in equity are somewhat broader. On analysis, the idea may be resolved into six elements: 1. There must be a representation as to facts by A, the party estopped; this representation may be by acts, by silence, or by language. 2. The truth as to the facts must be known to A at the time of his representation, or if not known to him, the knowledge must be imputed to him. 3. The truth concerning the facts must be unknown to B, the party claiming that A is estopped, at the time B acted upon A's

representations. 4. The representations must have been made with the expectation that they would be acted upon by B, or in such circumstances that B's acting upon them is a natural consequence. 5. B must act in reliance upon the representations, and 6. As a result of such acts must be in a position where he will suffer loss if A is now permitted to repudiate his representations.⁴⁴

186. **Same subject.**—Let us, with the aid of these rules, analyze the facts of a leading case.⁴⁵ One Horn was about to leave his native village to join his son Charles in a distant state. Desiring to evade his creditors, he packed his goods in a freight box, and while driving to the station, answered the inquiries of several persons with the statement that the contents of the box belonged to Charles. Among others, he made this statement to Cole, whom he had no special motive for deceiving, as Cole was not a creditor of his. Cole, however, had a claim against Charles, and in order to enforce the claim, levied attachment on the box in the belief that its contents was the property of Charles. Horn sues Cole for the detention of the goods; defense, that Horn was estopped by his statements. 1. Here we have conduct—language, in this case—representing that the goods belonged to Charles. 2. Horn, of course, knew the truth as to the ownership of the goods. If he had believed them to be his son's, there would have been no estoppel. 3. Cole was ignorant of the ownership; if he had known that the goods belonged to

⁴⁴ Pomeroy, *Equity Jurisprudence*, §§ 805, 808-812.

⁴⁵ *Horn v. Cole*, 51 N. H. 287, 12 Am. Rep. 111, H. & B. 101.

Horn, his seizure of them would clearly have been indefensible. 4. The representations were intended to be acted upon by Horn's creditors. He did not, to be sure, expect Cole's action, but that action was one which was naturally to be expected, if Cole were a creditor of Charles. 5. Cole levied his attachment, believing that Horn's statement was true, and 6. Will be liable in damages unless Horn is held to be estopped to deny the truth of the statement.

187. Applications of equitable estoppel.—One most important application of the doctrine of estoppel relates to the title of land. If A, being the owner of land, knowingly and without disclosing his title, allows B in good faith to deal with the land as his own—as by purchasing it from another, or loaning money upon it, or erecting valuable improvements upon it—A's title is postponed in equity to B's, so far as it is necessary for B's protection. This particular species of estoppel is not enforced by courts of law.⁴⁶ Another application has to do with the effect of delay in asserting one's right to an equitable remedy. If A is entitled to an equitable remedy against B—such as cancellation, or specific performance, or the enforcement of a constructive trust, etc.—and delays so long in asserting it that B concludes that A has waived his right, and therefore changes his position in reliance on the waiver so that he cannot be restored to his former state, A will lose his remedy in equity and be remitted to his

⁴⁶ *Storrs v. Barker*, 6 Johns. Ch. 166 (N. Y.), 10 Am. Dec. 316; *Hayes v. Livingston*, 34 Mich. 384, 22 Am. Rep. 533. See *Pomeroy, Equity Jurisprudence*, §§ 807, 818.

remedy at law⁴⁷ In fact, the doctrine of laches, by the better opinion, is rested on estoppel—an alteration in the defendant's condition, or a disadvantage in conducting his defense, resulting from the plaintiff's delay.⁴⁸

188. Penalties and forfeitures.—The doctrine of equity as to penalties and forfeitures is an application of the maxim, "Equity looks at the intent or substance and not at the form." If A contracts with B to do an act, and stipulates that on his failure he will pay to B a sum of money as a penalty for his non-performance, or will forfeit to B an estate in land, equity considers that the doing of the act was the real purpose of the contract, and the payment of the penalty or the forfeiture of the estate merely a means of securing performance. If, therefore, damages for the non-performance can readily be ascertained, exaction of the penalty will not be permitted; and in many cases the forfeiture will be relieved against and set aside. The doctrine of equity as to penalties has for the most part, been taken up and adopted by the common law; but not the doctrine as to forfeitures. If a party sues in a court of law today to recover a sum of money which is truly a penalty, his recovery will be limited to the damages actually sustained.⁴⁹

189. Penalties and liquidated damages.—If A,

⁴⁷ Powers' Appeal, 125 Pa. St. 175, 17 Atl. 254, 11 Am. St. Rep. 882, 1 Scott, Cases on Equity, p. 264; Dennis v. Jones, 44 N. J. Eq. 513, 14 Atl. 913, 6 Am. St. Rep. 899, 3 Keener, Equity Jurisdiction Cases, p. 728.

⁴⁸ Chase v. Chase, 20 R. I. 202, 37 Atl. 804; § 224; Pomeroy, Equitable Remedies, § 21, and cases cited.

⁴⁹ Pomeroy, Equity Jurisprudence, §§ 433, 434.

owing B \$1,000, payable January 1st, stipulates that on failure to pay on that date \$1,200 shall be due, the \$1,200 is a penalty, and B will be limited to the recovery of \$1,000 and interest. A sum of money thus agreed to be paid as security for the payment of a smaller sum is always a penalty.⁵⁰ Suppose, however, that A, a builder, agrees to complete a house for B by January 1st, and if the house is not completed by that date, to pay B \$25 for each day's delay. If the amount of inconvenience and loss which B will suffer by the delay are hard to estimate, and \$25 a day is not an unreasonable compensation therefor, A and B are quite at liberty to agree upon the damages beforehand, and thus avoid the difficulty of proving the actual damage to a jury.⁵¹ Or, A agrees to retire from his business in a certain place and not to engage in it again, in competition with B, and to pay B \$100 for each violation of the agreement. The actual damage that B will suffer by A's competition is very difficult or impossible to ascertain; this \$100, therefore, is not a penalty.⁵² Sums of money, agreed upon in a contract as damages for a breach, where the actual damage is uncertain or hard to estimate, are called "liquidated damages," and such agreements are perfectly valid, both in law and in equity.⁵³ If the act secured by

⁵⁰ *Gay Manufacturing Co. v. Camp*, 65 Fed. 794, 13 C. C. A. 137, 25 U. S. App. 134; *Krutz v. Robbins*, 12 Wash. 7, 40 Pac. 415, 50 Am. St. Rep. 871, 28 L. R. A. 676.

⁵¹ *De Graff, etc., Co. v. Wickham*, 89 Iowa 720, 52 N. W. 503.

⁵² *Green v. Price*, 13 M. & W. 695 (Eng.); *Jaquith v. Hudson*, 5 Mich. 123, H. & B. 62.

⁵³ *Keeble v. Keeble*, 85 Ala. 552, 5 South. 149, H. & B. 68; *Wallis Iron Works v. Monmouth Park Ass'n*, 55 N. J. L. 132, 26 Atl. 140, 39 Am. St. Rep. 626, 19 L. R. A. 456.

the fixed payment is one which, if not performed, readily admits of compensation, the sum fixed is a penalty. Whether the contract calls the payment a "penalty" or "liquidated damages" is of slight importance in determining its true nature.⁵⁴

190. **Forfeitures.**—Equity will not make a decree which has the result of enforcing a forfeiture. This rule is practically universal.⁵⁵ Equity, also, very often takes jurisdiction to relieve a party against a forfeiture not wilfully incurred; but it is difficult to formulate precise rules which shall reconcile the decisions on this subject. When the forfeiture was intended merely to enforce the payment of a sum of money—for example, a condition making void a lease on account of non-payment of rent—the forfeiture will be set aside on payment of the amount due.⁵⁶ The whole equity system of doctrines relating to mortgages is a development of this rule. Also, if the forfeiture was occasioned by fraud, or by unavoidable accident, or other similar cause affording a distinct ground for equitable relief, equity will intervene.⁵⁷ On the other hand, where the contract containing the forfeiture is one in which a provision for liquidated damages would be valid—the breach being difficult to compensate—the forfeiture will

⁵⁴ *Cushing v. Drew*, 97 Mass. 445; *Kunkle v. Wherry*, 189 Pa. St. 198, 42 Atl. 112, 69 Am. St. Rep. 802, H. & B. 61.

⁵⁵ *Craig v. Hukill*, 37 W. Va. 250, 16 S. E. 363, H. & B. 60; *Worthington v. Moon*, 53 N. J. Eq. 46, 30 Atl. 251.

⁵⁶ *Lundin v. Schoeffel*, 167 Mass. 465, 45 N. E. 933; *Noyes v. Anderson*, 124 N. Y. 175, 26 N. E. 316, 21 Am. St. Rep. 657.

⁵⁷ *Kopper v. Dyer*, 59 Vt. 477, 9 Atl. 4, 59 Am. St. Rep. 742, H. & B. 166, 1 *Scott, Cases on Equity*, p. 400; *Mactier v. Osborn*, 146 Mass. 399, 15 N. E. 641, 4 Am. St. Rep. 323.

stand; the parties merely having fixed their damages in that form;⁵⁸ but this rule is subordinate to the one just stated. It cannot be said, however, that a forfeiture will be set aside in every case in which a penalty would be relieved against. Though the contract is one which easily admits of exact compensation for its breach, equity will not necessarily relieve against a forfeiture therein. Whether or not relief should be given in such cases seems to be largely a matter of discretion.⁵⁹

191. **The doctrine of election.**—A made a will by which he bequeathed to B a debt of \$5,000 which B owed to A; and devised and bequeathed all the rest of his property to C. Now, it appears that B owed no debt to A at the time of the will or later; but B had owed a debt of \$5,000 to A, evidenced by a note and mortgage which A had transferred to C, so that it is now C's property. A, of course, cannot make a disposition of C's property which will be binding on C. C may, if he chooses, retain his property—in this case, his \$5,000 mortgage against B. But, if he decides to do this, it is only fair to B and to the testator that he should not claim the whole of the property which A gave him and which A had a right to dispose of. If he claims a benefit under A's will, he must be willing to do equity, and make compensation to B for the loss of the benefit which A de-

⁵⁸ *Croft v. Goldsmid*, 24 Beav. 312 (Eng.); *Klein v. New York Life Insurance Co.*, 104 U. S. 88.

⁵⁹ *Willson v. Mayor, etc., of Baltimore*, 83 Md. 203, 55 Am. St. Rep. 339, 34 Atl. 774 (relief given); *Tennessee Manufacturing Co. v. James*, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211 (no relief given); 1 *Pomeroy, Equity Jurisprudence* (3d ed.), §§ 450, 456, and cases cited.

signed B to have. Or, C may prefer to accept the terms of the will exactly as it stands. In that case he will be compelled, if necessary, to execute a conveyance of his property which A has willed to B.⁶⁰ The rule is the same if C's property which A devises to B is real estate—Blackacre. C, if he elects to retain Blackacre, can claim a benefit under the will only on condition that he compensates B by paying him the value of Blackacre. Or, if C elects to accept the will as it stands, he must convey Blackacre to B in accordance with the will's directions. The doctrine, then, is that when a donor, by an instrument—almost always a will—gives to C a benefit and at the same time disposes of C's property to B, C may elect to take either against or under the instrument; if he takes against the instrument he can receive a benefit therefrom only on condition of compensating B for his disappointment.⁶¹

192. Same subject—Donor has a partial interest.—Suppose the donor, A, gives to B property which he describes as “my farm,” and it happens that C—who also receives \$10,000 under the instrument—owns a part of the property that A operates as his farm. The question will then arise, is C put to any election? Did A mean to give to B the part that was his own property—the only part that he could accurately describe by the word “my”; in which case, of course, C retains his part and also takes the \$10,000; or did A mean by the words “my farm” to describe the whole property that he operated—

⁶⁰ *Fithugh v. Hubbard*, 41 Ark. 64, H. & B. 128.

⁶¹ *Pomeroy*, *Equity Jurisprudence*, §§ 462-472, 476-486.

both his own part and C's part; in which case C, on electing to retain his part, must compensate B for the latter's disappointment out of the \$10,000. If there is any doubt on the subject, the courts lean very strongly in favor of the former answer—that the testator meant to dispose of his own property only, so that there is no election by C. If, however, the language used can only be fairly interpreted as a description of the whole estate, A's and C's parts together, the latter solution must be accepted, and C be put to an election; as in a case where the estate belonged partly to A and partly to C, his wife, and was generally called as a whole, the "Home farm," and was so described in A's will.⁶²

193. Same subject—Election by widow as to dower.—By far the commonest example of the situation described in the last paragraph is that where C is the widow of A, having a dower right in his lands. The rule of equity was well settled, that C was entitled to her dower in addition to the gifts conferred upon her by the will, unless the gifts were made expressly in lieu of dower, or unless the dispositions made by the will were plainly inconsistent with the allotment of dower to C in A's lands.⁶³ Thus, a devise of the lands in trust to be sold was taken to mean that the lands were to be sold subject to the widow's dower therein.⁶⁴ Statutes in many states have changed this rule, and, strangely

⁶² *Penn v. Guggenheimer*, 76 Va. 839, H. & B. 123.

⁶³ *Adsit v. Adsit*, 2 Johns. Ch. 448 (N. Y.), 7 Am. Dec. 539; *Herbert v. Wren*, 7 Cranch 370 (U. S.).

⁶⁴ *Konvalinka v. Schlegel*, 104 N. Y. 125, 58 Am. Rep. 494, 9 N. E. 868, H. & B. 132, LEADING ILLUSTRATIVE CASES.

enough, to the widow's disadvantage. By these statutes, the widow is always compelled to elect between her dower and provisions made for her in the will, unless it expressly appears on the face of the will that the provisions for her were in addition to her dower.⁶⁵

194. **The doctrine of satisfaction.**—The doctrine of satisfaction has to do with certain situations arising—not very frequently in this country—in the interpretation of wills. There are four classes of cases: 1. A owes B \$1,000, payable January 1, 1913, and dies before that date, leaving a legacy to B of \$1,000 or more, also payable January 1, 1913. A presumption arises that A does not wish his estate to pay both B's debt and his legacy; B, therefore, is required to elect between the two. This presumption, however, is not a very strong one, but may be defeated by slight circumstances.⁶⁶ 2. If A gives to B a legacy of \$1,000, and in the same will or its codicil gives B \$1,000 again, the second legacy is presumed to be in substitution for, or in satisfaction of, the first. But this result does not follow where the two legacies to B are given in different wills; or where the two legacies to B are of a different amount.⁶⁷

195. **Same subject—Legacies and advancements or portions.**—The commonest form of satisfaction is the third. 3. A being B's parent, or *in loco parentis*

⁶⁵ Reed v. Dickerman, 12 Pick. 146 (Mass.), H. & B. 124; Warren v. Warren, 148 Ill. 641, 36 N. E. 611, 22 L. R. A. 393.

⁶⁶ Strong v. Williams, 12 Mass. 391, 7 Am. Dec. 81, H. & B. 140.

⁶⁷ De Witt v. Yates, 10 Johns. 156 (N. Y.), 6 Am. Dec. 326, H. & B. 144; Edwards v. Rainier's Ex'rs, 17 Ohio St. 597, H. & B. 146.

(in a parent's place) to B, makes his will, leaving B a legacy of \$1,000. Later, during A's lifetime, he makes a gift to B either equal to, or less or greater in amount than, the legacy. The presumption then arises that the gift was in satisfaction of the legacy, either wholly or *pro tanto* (so far as it goes). If, therefore, the gift was greater than the legacy, B takes nothing by the legacy. If it was less than the legacy—say \$800—he takes the difference, or \$200.⁶⁸ The rule, it will be noted, creates a presumption merely, which may be defeated by evidence of A's intention that B should take both the legacy and the gift. No such presumption arises when the legacy and gift are to a stranger. The theory of the rule is, that a parent naturally and usually wishes to benefit his children equally; if, therefore, after naming in his will the portion that a child is to receive, he makes a large gift to his child, on the occasion, say, of the child's marriage, the chances are that he did not wish to confer a double portion on that particular child, but intended the gift to be an advancement to the child on his portion. The testator, in short, becomes his own executor to the extent of the gift. With respect to gifts to strangers, however, testators have no such natural tendency to an equality of distribution. While there is no general presumption in the case of gifts to persons other than children, a gift to such person may be expressly made in satisfaction of a prior legacy.⁶⁹

⁶⁸ *Ex parte Pye*, 18 Ves. 140 (Eng.); *Pym v. Lockyer*, 12 Sim. 394 (Eng.); *Clark v. Jetton*, 5 Sneed. 229 (Tenn.), H. & B. 155.

⁶⁹ *Richards v. Humphreys*, 15 Pick. 133 (Mass.).

4. A, by a settlement or similar instrument, secures to his child B a portion, and afterwards by will leaves B a legacy. Here again, there is a presumption that B is not to take both the portion and the legacy; he must choose between them.⁷⁰ This class is of little practical importance in this country, where formal family settlements are rare.

⁷⁰ *Montagu v. Earl of Sandwich*, 33 Beav. 324 (Eng.); *Gilliam v. Chancellor & Murray*, 43 Miss. 437, 5 Am. Rep. 498.

CHAPTER XIV.

NOTICE—BONA FIDE PURCHASE—PRIORITIES.

196. **Notice.**—We have frequently had occasion to state in relation to various equitable remedies and interests, that they were not enforceable against a bona fide purchaser without notice; and conversely, that they were enforceable against a purchaser with notice. It is necessary, therefore, to explain what is meant by the “notice” which has this important effect. In the first place, “notice” and “knowledge” are not by any means synonymous. A party who has knowledge of another’s right also has notice of that right; but it by no means follows that a party without knowledge of A’s right has no notice of that right. For example, the instrument creating a right in A may have been put on record, and B in consequence, who had never had the slightest intimation of the existence of such an instrument, may be as much bound by notice as if he knew every word of the instrument by heart. The question, What gives to B notice of A’s right? means, What acts or circumstances are equivalent in their legal effect to an actual knowledge by B of A’s right? In the example given the notice is constructive; that is to say, it is presumed as a conclusion of law.⁷¹

197. **Actual notice.**—In cases of actual notice, on the other hand, is it inferred as a conclusion of fact

⁷¹ Pomeroy, Equity Jurisprudence, §§ 591-594.

that B obtained information of A's right. Suppose, for example, that B purchases land from C in which A has an interest. There is no direct evidence that A ever told B of this interest. It appears, however, that A was a member of B's family, and that B was acquainted with A's business affairs. From such facts, if strong enough, it may be inferred that B had information of A's claim; this inference, however, like any other inference from circumstantial evidence, may be rebutted by B.⁷² Often the circumstances are such that they are said to put B upon inquiry. Thus, B purchases land worth \$10,000 from C for \$4,000. As a fact, A has an unrecorded claim upon the land—say, a mortgage or lien. Can the court or jury infer from this great inadequacy of the price at which C sold to B that B had notice of A's claim? The court or jury may properly reason thus: B, from the fact that C was willing to sell for so small a price, should have his suspicions aroused, and proceed to make all reasonable inquiries as to the existence of some claim upon the land by another party. B offers us no evidence that he made any investigation; it must be that he made no investigation because of his guilty knowledge that it would lead to a discovery of the truth. We are, therefore, justified in inferring that B had information of A's claim. If B shows us that he made some investigation, in a careless, perfunctory manner, the same inference is justified: he did this to keep up appearances. If, however, B shows as thorough an investigation as can reasonably be ex-

⁷² Pomeroy, Equity Jurisprudence, § 596, and note.

pected as to the existence of adverse claims to the land, without the discovery of A's claim, his character as an honest man is established; he has rebutted the inference or presumption of notice raised by the suspicious circumstances.⁷³

198. **Same subject.**—If B is informed by C, with whom he is dealing, or by A himself, that A has some claim on the property, he is, of course, bound to investigate and find out the nature of the claim.⁷⁴ If, however, his information comes from outside parties, whether or not he is put on inquiry depends upon circumstances. He need not stop to investigate every vague rumor or idle gossip. The test is, What would an honest man, of ordinary common sense, do, on the strength of the information received? His knowledge of a custom among business men may often necessitate an inquiry. Thus, B, negotiating for the purchase of C's liquor saloon, knows that C is indebted to A, a brewer, and also knows that it is the custom of brewers, in making loans to saloon keepers, to take a mortgage on their premises. Obviously, then, it is B's duty to inquire whether A holds a mortgage from C; if B purchases without making proper inquiries, he takes with notice of A's mortgage.⁷⁵ In prosecuting his inquiries, B should not rest satisfied with the information which C, the party with whom he is dealing, may

⁷³ *Dunn v. Barnum*, 51 Fed. 355, 10 U. S. App. 86, 2 C. C. A. 265; *Connecticut Mut. Life Ins. Co. v. Smith*, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656; *Pomeroy*, *Equity Jurisprudence*, § 597, and cases cited.

⁷⁴ *Barnes v. McClinton*, 3 Pen. & W. 67 (Pa.), 23 Am. Dec. 62; *Price v. McDonald*, 1 Md. 403, 54 Am. Dec. 657.

⁷⁵ *Whitbread v. Jordan*, 1 Younge & C. 303 (Eng.); *Williamson v. Brown*, 15 N. Y. 354, H. & B. 86.

give; for it is to C's interest to represent that the property which is the subject of negotiation is free from adverse claims.⁷⁶

199. **Constructive notice—(1) By possession.**—Constructive notice, as has been stated, is a conclusion of law. One of the commonest species is that arising from possession of the land by a third person. B is negotiating for the purchase of land from C. The land in fact is occupied not by C, but by A, to whom C has previously made a valid contract to convey, so that A owns the vendee's equitable interest. B, as a prudent man, should ascertain who is occupying the land, and should ascertain from the occupant what rights he claims. In this case, as distinguished from cases of actual notice, it is not a mere inference of fact from circumstantial evidence that B is apprised of A's rights. It is a conclusion of law, arising from the fact of A's possession. In theory, it is a conclusion that may be rebutted by B; practically, however, the legal presumption is conclusive, since reasonably diligent inquiries would almost always result in finding out from A the truth as to A's claim.⁷⁷

200. **Same subject—Of what the possession is notice.**—Suppose that A, the adverse claimant, is not in actual occupation of the land himself, but has put D into possession as his tenant for a year. Of what does B, the purchaser, have notice; merely of D's right to the land as tenant for the remainder of the

⁷⁶ Pomeroy, *Equity Jurisprudence*, § 601.

⁷⁷ *Kirby v. Tallmadge*, 160 U. S. 397, 16 Sup. Ct. 349; *Bank of Mendocino v. Baker*, 82 Cal. 114, 22 Pac. 1037, 6 L. R. A. 833; *Phelan v. Brady*, 119 N. Y. 587, 23 N. E. 1109.

year, or, in addition to this, of the rights of A, his landlord? There is authority both ways; but the majority of the cases hold the latter view. If B had made proper inquiries of D, he would, in all probability, have discovered that D was A's tenant, and so would have been led to inquire from A what his rights were. A tenant's possession, by this view, is notice of the landlord's title.⁷⁸ Again, A, a grantor, makes an absolute deed conveying the legal title to C, but reserves some right which entitled him to possession—for example, has an agreement which turns his deed into a mortgage. This agreement is not on record; but A retains possession of the land. Is this possession notice to B, the purchaser from C? Many cases hold that it is: that B is under the usual duty to make inquiries from A.⁷⁹ Other cases hold the contrary; pointing out that B, knowing from the record that his vendor, C, held by deed from A, would find nothing inconsistent—nothing to excite his suspicion—in the fact that A was still in possession, since it is a common thing enough for grantors to remain on sufferance for some time after they have conveyed title.⁸⁰ Again, the possession of A, in order to act as notice, must be exclusive, not shared with C. If C, for instance, has sold the premises to A, his wife, who shares C's occupation, and B buys from C on the faith of C's record title, the

⁷⁸ *Thomas v. Burnett*, 128 Ill. 37, 21 N. E. 352, 4 L. R. A. 222. H. & B. 90, LEADING ILLUSTRATIVE CASES; *Phelan v. Brady*, 119 N. Y. 587. *Contra*, *Hunt v. Luck*, (1901) 1 Ch. 45 (Eng.), (1902) 1 Ch. 428.

⁷⁹ *Illinois Central R. R. v. McCullough*, 59 Ill. 166; *Groff v. State Bank*, 50 Minn. 234, 52 N. W. 651, 36 Am. St. Rep. 640.

⁸⁰ *Turman v. Bell*, 54 Ark. 273, 15 S. W. 886, 26 Am. St. Rep. 35; *Bloomer v. Henderson*, 8 Mich. 395, 404, 77 Am. Dec. 453.

wife's partial possession is no notice of her rights to B. It would, plainly, be pushing the rule of notice by possession to an inconvenient length to require a purchaser to make inquiries from every member of his vendor's family, on the possibility that one member might have an individual right.⁸¹

201. Constructive notice—(2) Notice by lis pendens.—Another very important species of constructive notice is that by *lis pendens*—by the pendency of an equity suit concerning the property. If during the progress of such a suit a party to the suit alienates the land to B, B takes the land subject to the rights of the prevailing party as determined by the final decree. The beginning of the suit is notice to B,—a notice that is absolutely binding and cannot be rebutted. Some such rule is a necessity to judicial proceedings: for if it were otherwise, a separate suit against B would be necessary; and B, during that suit might transfer the land to D, and so on indefinitely, making litigation interminable.⁸² The notice given by pendency of a suit begins from the time when the court acquires jurisdiction of the defendant by service of the subpoena or summons after the filing of the bill,⁸³ and lasts until judgment, or until the expiration of a reasonable time to appeal after the judgment.⁸⁴ The effect of the notice, however, may be lost by a lack of diligence in prosecuting the

⁸¹ Kirby v. Tallmadge, 160 U. S. 379, 16 Sup. Ct. 349; Rankin v. Coar, 46 N. J. Eq. 566, 22 Atl. 177, 11 L. R. A. 661.

⁸² Pomeroy, Equity Jurisprudence, §§ 632, 633; Bellamy v. Sabine, 1 De G. & J. 566, 578, 584 (Eng.); Turner v. Hout, 53 N. J. Eq. 526, 33 Atl. 28.

⁸³ Norris v. Ile, 152 Ill. 190, 199, 38 N. E. 762, 43 Am. St. Rep. 233.

⁸⁴ Olson v. Liebpke, 110 Iowa 594, 81 N. W. 801, 80 Am. St. Rep. 327.

suit.⁸⁵ The notice exists in all suits in equity concerning specific land; to what extent it exists in suits concerning personal property is not entirely settled. It is universally agreed, however, that the notice does not extend to a suit relating to negotiable instruments. Even if A, the plaintiff in such a suit, obtains an injunction against B, the holder of the negotiable instrument, B may still transfer a good title, in violation of the injunction, to C, a bona fide purchaser for value before maturity of the paper.⁸⁶

202. **Same subject—(3) Notice by reference in the chain of title.**—A person is bound by notice of matters recited or referred to in his chain of title,—that is, in the succession of deeds or other instruments by which he traces his title back to its original source. Thus, A holds by deed from B, who held by a deed from C. The latter deed recited that it was made subject to a lease or mortgage to X. A is bound with notice of X's lease or mortgage, even though he never heard of it, and never read the deed from C to B in which it is referred to.⁸⁷ Moreover, he is bound by notice of all that is contained in X's lease or mortgage. An express reference to the instrument is not necessary to constitute a notice; a recital in A's chain of title may lead A to infer that such an instrument is in existence. Thus, a statement in the deed from C to B that the lot conveyed

⁸⁵ Taylor v. Carroll, 89 Md. 32, 42 Atl. 920, 44 L. R. A. 379.

⁸⁶ County of Warren v. Marcy, 97 U. S. 96, 1 Scott, Cases on Equity, p. 29.

⁸⁷ National Bank v. Morris, 114 Mo. 255, 21 S. W. 511, 35 Am. St. Rep. 54, 19 L. R. A. 463; Pringle v. Dunn, 37 Wis. 449, 464, 19 Am. Rep. 772, C. & B. 92.

is bounded by the land of Y leads to the inference that Y holds the adjoining lot by an earlier title—a fact that may be of importance to A, as in the case where both lots are covered by the same mortgage.⁸⁸ The statement or recital may give rise to the inference of some fact other than the existence of a document or instrument. Thus, if the deed from C to B recites that a part of the purchase money is unpaid, A, purchasing from B, will be bound by notice of C's lien for the purchase price, in those states where the grantor's lien exists.⁸⁹

203. **Same subject—(4) Notice by recording.**—It is the universal policy in this country to secure publicity and certainty in titles to land by means of the registration or record in a public office of all instruments affecting the titles. The statutes declare, in effect, that a conveyance, mortgage, etc., from A to B is void as against a subsequent conveyance, mortgage, etc., from A to C which is first put on record. The necessary result is, that if B's instrument is recorded first, the record is constructive notice, absolutely binding on all persons subsequently dealing with A respecting the land. Such persons cannot be heard to say that they made inquiries, examined the record, etc., and obtained no knowledge of B's instrument. In order to have this effect upon C, the subsequent purchaser, B's instrument must be one which the statutes authorize to be recorded. The statutes, for example, almost always require the instrument to be duly executed and properly acknowl-

⁸⁸ *George v. Wood*, 9 Allen 80 (Mass.), 85 Am. Dec. 741.

⁸⁹ *Deason v. Taylor*, 53 Miss. 697, 701, H. & B. 97.

edged, in order to be entitled to record. If these formalities are not complied with by B, placing the instrument on record is a nullity, so far as imparting constructive notice to C, the subsequent purchaser, is concerned.⁹⁰

Suppose, again, that the registration officer is negligent in the performance of his duty, and makes a mistake in transcribing the instrument; for example, B's mortgage is expressed to be for the sum of \$10,000, but through careless copying the record of it is made to read \$1,000 only. Is C, a subsequent purchaser of the land, affected with notice of the mortgage to its full amount, \$10,000, or only to the extent of \$1,000? The latter would seem the fair and reasonable answer, since it is no great burden on B to require of him that he see to it that his instrument is properly recorded.⁹¹ About half the states, however, hold that C has notice of the terms of the original instrument: being led to this conclusion by the language of the recording acts, many of which state that the recording is deemed to be complete, so far as B is concerned, from the moment when his instrument is left with the proper officer for record.⁹² It logically follows that B is secure after depositing his instrument for record, though it was never transcribed upon the recorder's books at all. All cases agree that the effect of a record, once made, is

⁹⁰ *Pringle v. Dunn*, 37 Wis. 449, 460, 461, 19 Am. Rep. 772, H. & B. 92; *Lynch v. Murphy*, 161 U. S. 247, 16 Sup. Ct. 523.

⁹¹ *Frost v. Beekman*, 1 Johns. Ch. 288 (N. Y.), 1 Scott, Cases on Equity, p. 531, LEADING ILLUSTRATIVE CASES; *Ritchie v. Griffiths*, 1 Wash. 429, 25 Pac. 341, 22 Am. St. Rep. 155, 12 L. R. A. 354.

⁹² *Farabee v. McKerrihan*, 172 Pa. St. 234, 33 Atl. 583, 51 Am. St. Rep. 734; *Mangold v. Barlow*, 61 Miss. 593, 48 Am. Rep. 84.

not destroyed by the subsequent destruction by fire or otherwise, of the recorder's books.⁹³

204. **To whom the record is notice.**—A makes a mortgage to B, and B assigns the mortgage to C, who puts his assignment on record. Is this record notice to A, so that A's subsequent payments to B, in ignorance of the assignment, are ineffectual to reduce the mortgage debt? So to hold would, manifestly, be a hardship to A, who would then be obliged to search the record every time he made a payment of principal or interest. Notice by record does not act retrospectively, so as to affect rights which have already been acquired. At first sight this seems inconsistent, perhaps, with the rule that C's prior record of his later instrument defeats D's earlier unrecorded instrument. In case, for instance, the mortgagee had made two assignments, first to D, unrecorded, and afterwards to C, recorded, C's would prevail. This result follows, however, from the express language of the statute, which declared that C's earlier record avoids D's title: not that C's earlier record is notice to D.⁹⁴

Again, suppose that A conveys a lot to B, who neglects to record his deed; B then conveys to C, whose deed is put on record. Later, A conveys the same lot to X. Has X constructive notice of C's deed? So to hold would, in practice, put upon X the necessity of examining every instrument in the recorder's office, on the chance that it might relate to

⁹³ *Deming v. Miles*, 35 Nebr. 739, 53 N. W. 665, 37 Am. St. Rep. 464.

⁹⁴ *Murphy v. Barnard*, 162 Mass. 72, 38 N. E. 29, 44 Am. St. Rep. 340; *Williams v. Keyes*, 90 Mich. 290, 51 N. W. 520, 30 Am. St. Rep. 438.

the lot which he is about to purchase; for the records are indexed, not by description of the land, but by the names of grantors and grantees. C's deed, therefore, so far as X or other purchasers deriving title from A are concerned, is not within the protection of the recording acts.⁹⁵ When there is a break like this in a recorded chain of title, subsequent deeds in the chain impart no notice to parties deriving title from a record owner further up in the chain of title.

205. Other notice in place of a record.—Suppose A conveys to B, and B's deed is unrecorded; A subsequently conveys to C, who records his deed; but C at the time of his purchase has notice of some kind, of B's deed: say, notice from facts putting him on inquiry, or notice from B's possession of the land. Now the statutes of many states declare, without making any exception, that C's prior record renders void B's prior deed. Notwithstanding, it is almost universally agreed that if C purchased with notice of any sort, actual or constructive, of B's title, his prior record is no protection to him, and he takes subject to B's rights under the unrecorded instrument, whatever those rights may be. This rule is adopted and enforced in this country, by courts of law and of equity alike. It is wholly independent of any question of fraud or bad faith on the part of C, the subsequent purchaser. The purpose of the recording acts is to give notice of prior titles; if that notice has already been imparted in some way which

⁹⁵ *Losey v. Simpson*, 11 N. J. Eq. 246; *Scotch Lumber Co. v. Sage*, 132 Ala. 598, 32 South. 607, 90 Am. St. Rep. 932.

the law recognizes, the purpose of the statutes has been accomplished. Virtually then, nearly all such acts are interpreted as if they read (as indeed many of them do read), An unrecorded instrument is void as against a subsequent bona fide purchaser without notice, whose instrument is first recorded.⁹⁶

206. Constructive notice—(5) Notice to agent is notice to principal.—Notice to an agent, received in the course of his employment, is notice to his principal.⁹⁷ The policy and necessity of this rule is obvious; without it, a person could protect himself from the liabilities depending on many forms of notice by the simple method of employing an agent. The rule, however, is subject to various limitations to prevent its working an injustice to the principal. Thus, the notice must, as a general rule, have been received by the agent in the same transaction.⁹⁸ For example, if A is employed by B to loan money for him and take a mortgage on certain land, notice received by A in the course of the transaction that there was an unrecorded mortgage on the land would be binding on B, while similar notice imparted to A ten years before would not affect B. If, however, the notice was given to A so recently that he must have had it in mind while transacting B's business, B is affected by such actual knowledge on A's part.⁹⁹ Again, the rule will not be allowed to protect an

⁹⁶ Pomeroy, *Equity Jurisprudence*, §§ 659-665.

⁹⁷ *The Distilled Spirits*, 11 Wall. 356 (U. S.); *Fairfield Sav. Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319.

⁹⁸ *Lowther v. Carlton*, 2 Atk. 242 (Eng.), 1 Scott, *Cases on Equity*, p. 501; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772, H. & B. 92.

⁹⁹ *The Distilled Spirits*, 11 Wall. 356 (U. S.); *Constant v. University of Rochester*, 111 N. Y. 604, 19 N. E. 631, 7 Am. St. Rep. 769, 2 L. R. A. 734.

agent in a fraud upon his principal. If the agent receives notice of a fact while committing a fraud on his principal for his own benefit, and the success of the fraud requires that he keep the fact to himself, there can be no presumption that he imparted his knowledge of the fact to the principal; his knowledge or notice, therefore, does not affect the principal.¹

207. **Bona fide purchaser**—**The valuable consideration.**—The absence of notice is only one of the elements that go to make up a bona fide purchase. Good faith—*bona fides*—is another. If the party setting up the defense of bona fide purchase himself obtained his title from his immediate grantor through fraud of any sort, he is not entitled to protection.² The third element is the valuable consideration. A volunteer—a donee, devisee, or heir,—is not a bona fide purchaser. There must be a parting with something of value, or a change of legal position for the worse.³ The chief difficulty comes in determining whether an antecedent debt is a valuable consideration. A owes B \$1,000; in consideration of B's promise to consider the debt satisfied, or to forbear suing on it for a certain time, A conveys Blackacre to B: B in either case, having given up a legal advantage, is a purchaser for value.⁴ On the other hand, suppose that A conveys Blackacre

¹ American Surety Co. v. Pauly, 170 U. S. 133, 18 Sup. Ct. 552; Innerarity v. Merchants' Nat. Bank, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710.

² Pomeroy, Equity Jurisprudence, § 762.

³ Ten Eyck v. Whitbeck, 135 N. Y. 40, 31 N. E. 994, 31 Am. St. Rep. 809; The Elmbank, 72 Fed. 610.

⁴ State Bank v. Frame, 112 Mo. 502, 20 S. W. 620; Randolph v. Webb, 116 Ala. 135, 22 South. 550; *contra*, Sleeper v. Davis, 64 N. H. 59, 6 Atl. 201, 10 Am. St. Rep. 377.

to B merely as security for the payment of the \$1,000 already owing: B has parted with nothing, but on the contrary is better off than he was before; hence B is not a purchaser for value.⁵ To both of these two rules, however, there is much dissent. There is a general agreement that the amount of the consideration is immaterial to the question of purchase for value; though, as we have already seen, a grossly small consideration may excite suspicion, and put upon inquiry, and in this way give rise to actual notice.⁶

208. Same subject—The payment.—The payment must be actual, not a mere contract to pay. If A receives a conveyance from B on a promise to pay therefor \$1,000, and then loses the land to C on the latter's prior claim, A can resist B's suit for the \$1,000 because of failure of the consideration; or if he has given a bond for the \$1,000, so that he cannot set up failure of consideration in a suit thereon by B, he may have the bond cancelled in equity.⁷ A, therefore, by his mere contract to pay has made no irrevocable change of position, and hence is not a purchaser for value. On the other hand, if A has given to B his negotiable note for the price, he has put it in B's power to cut off his defense of failure of consideration by negotiating the note before maturity; a payment by A in this form,

⁵ *Young v. Guy*, 87 N. Y. 457, 1 Ames, Equity Jurisdiction Cases, p. 207; *Adams v. Vanderbeck*, 148 Ind. 92, 45 N. E. 645, 47 N. E. 24, 62 Am. St. Rep. 497; *contra*, *Chaffee v. Atlas Lumber Co.*, 43 Nebr. 224, 61 N. W. 637, 47 Am. St. Rep. 753.

⁶ See § 197; *Dunn v. Barnum*, 51 Fed. 355; *Ten Eyck v. Whitbeck*, 135 N. Y. 40, 31 N. E. 994, 31 Am. St. Rep. 809.

⁷ *Jewett v. Palmer*, 7 Johns. Ch. 65 (N. Y.), 11 Am. Dec. 401.

therefore, is equivalent to a payment in cash.⁸ Again, suppose that A has paid part, but not all, of the price, before receiving notice of C's adverse claim. Some courts hold that he is in no better position than if he paid nothing at all.⁹ This seems unduly harsh to A. C should at least be compelled to refund to A as a condition of enforcing the prior claim such payment as A has made; or, perhaps, A should be treated as a bona fide purchaser of a partial interest in the land.¹⁰

209. Purchaser with notice from a bona fide purchaser.—Suppose that A conveys to B, a bona fide purchaser without notice of X's prior right, and B in turn conveys to C who takes with notice of that right. At first sight, we should take it for granted that X's right was enforceable against C. The rule, however, is the other way. B in order to reap the full advantage of his position as a bona fide purchaser must be able not only to enjoy the possession of the property, but to alienate it freely. When land once comes into the hands of a bona fide purchaser it is forever freed from the equities which might before have been asserted against it.¹¹ To this rule there is one exception. If a former owner of the land, before it reached B's hands—A, for instance,—had

⁸ Partridge, Wells & Co. v. Chapman, 81 Ill. 137; Davis v. Ward, 109 Cal. 186, 41 Pac. 1010, 50 Am. St. Rep. 29.

⁹ Tourville v. Naish, 3 P. Wms. 307 (Eng.); Dugan v. Vattier, 3 Blackf. 245 (Ind.), 25 Am. Dec. 105.

¹⁰ Davis v. Ward, 109 Cal. 186, 41 Pac. 1010, 50 Am. St. Rep. 29; Yarnell v. Brown, 170 Ill. 362, 48 N. E. 909, 62 Am. St. Rep. 380.

¹¹ Harrison v. Forth, Prec. Ch. 51 (Eng.), 1 Scott, Cases on Equity, p. 500; Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772, H. & B. 92; English v. Lindley, 194 Ill. 181, 62 N. E. 522.

notice of X's equity, B's reconveyance to such former owner will revive the equity. This exception is not an arbitrary one. It is designed to prevent a holder in bad faith from perfecting his title by the easy device of conveying to a purchaser whose bad faith might be difficult to prove, and then re-purchasing at his convenience.¹²

210. **Is a quitclaim grantee a bona fide purchaser?**—A conveys title to B by quitclaim deed—one without the usual covenants of warranty. Many cases—perhaps a majority—hold that by accepting a deed in this form B forfeits all right to be considered a bona fide purchaser; that he is apprised thereby that A has not a perfect title, and hence takes subject to X's prior unrecorded claim.¹³ Other cases deny all this, and assert that there is nothing about a quitclaim deed that imparts notice, and that a quitclaim grantee, therefore, may be as much a bona fide purchaser as a grantee by warranty deed.¹⁴ A third group of cases holds that a quitclaim grantee may be a bona fide purchaser, but that the absence of warranty should arouse his suspicion, and put him upon reasonable inquiry as to the existence of other claims against the land. This seems to be a reasonable view, but is the law of only a few jurisdictions.¹⁵

¹² Clark v. McNeal, 114 N. Y. 295, 21 N. E. 405, 11 Am. St. Rep. 638.

¹³ American Mortgage Co. v. Hutchison, 19 Ore. 334, 24 Pac. 515.

¹⁴ Moelle v. Sherwood, 148 U. S. 21, 13 Sup. Ct. 426; Wilhelm v. Wilken, 149 N. Y. 447, 44 N. E. 82, 52 Am. St. Rep. 743, 32 L. R. A. 370.

¹⁵ United States v. California & O. Land Co., 49 Fed. 496, 505, 7 U. S. App. 128, 1 C. C. A. 330; Schott v. Dosh, 49 Nebr. 187, 68 N. W. 346, 59 Am. St. Rep. 531. See, also, 2 Pomeroy, Equity Jurisprudence, (3d ed.), § 753, note.

211. How the question of bona fide purchase may arise.—The defense of bona fide purchase was originally and still is for the most part an equitable defense, arising where the holder of a prior equitable interest or “equity” sought to enforce it against the holder of the legal estate.¹⁶ Contests between holders of rival “equities” or equitable interests are governed by a different set of rules.¹⁷ Apart from the recording acts, there was very little occasion for its application in a suit by the holder of a legal estate.¹⁸ If A conveys Blackacre to B, and afterwards A conveys the same land to C, the dispute between B and C concerns legal titles only, and presents no question for equity.¹⁹ To B’s action for ejectment against C, it was no defense (before the recording acts) that C purchased in good faith with no notice of B’s title: since all A’s estate passed by the first conveyance, there was nothing left to pass to C. The recording acts, as interpreted by the courts, have changed this, as we have seen. The dispute between B and C concerning their legal titles is still a legal question, to be tried in ejectment. Whether C, however, can set up his prior record in defense to B’s ejectment, depends upon whether he purchases without notice and for value—a question of equity. The effect of the recording acts, then, has been to carry over into the common law the equity doctrine as to bona fide purchase, and to apply it in contests between legal

¹⁶ Pomeroy, *Equity Jurisprudence*, §§ 735-744, 766-778.

¹⁷ See §§ 212-215.

¹⁸ For the exceptional cases, see Pomeroy, *Equity Jurisprudence*, §§ 764, 765.

¹⁹ Pomeroy, *Equity Jurisprudence*, § 679, and notes.

titles.²⁰ While the doctrine has thus become a legal one, applied by courts of common law, its application by courts of equity remains unaltered. The defense may be set up if the facts warrant it, in all suits to enforce or establish an equitable interest in land,—suits for specific performance, to foreclose a mortgage, or other lien, to enforce a constructive or resulting trust, and the like.²¹ The defense may likewise be set up in suits to enforce an equity—that is, a right to an equitable remedy—affecting the land, such as reformation or rescission for mistake, or cancellation for fraud.²²

212. Priorities.—We have now to consider the question, where there are two or more rival equitable interests in the same property, which shall prevail? If A and B both have an equitable lien on the same land, and its proceeds are not sufficient to pay both, which shall be paid first? If C assigns a thing in action or a fund to A and afterwards to B, does A or B have the first claim? The rules for settling such questions are summed up in two maxims: Where there are equal equities, the first in order of time shall prevail; and Where these are equal equities, the law shall prevail. Applying these maxims to the solution of a problem of priorities, we first ask, Are the equities intrinsically equal? Are they of the same rank, are A and B equally without fault, and entitled to equal consideration from the court? If they are thus equal, we next ask, has either A or

²⁰ Pomeroy, *Equity Jurisprudence*, §§ 758, 759.

²¹ Pomeroy, *Equity Jurisprudence*, §§ 766-773.

²² Pomeroy, *Equity Jurisprudence*, §§ 775-778.

B obtained the legal estate in the property in addition to his equitable claim? If this question is answered in the negative, we fall back, as a last resort, upon the order of time in which the equities arose, and award priority to the one first created.²³

213. **What equities are intrinsically superior—Purchase money mortgages—Judgment liens.**—For lack of any general definition, we may give an illustration of an equity which is intrinsically superior. A contracts to convey land to B: before conveyance is made, C, a claimant against B obtains a lien on the land:—say, a mechanics' lien. A then conveys to B and as part of the same transaction takes back a purchase money mortgage to secure the price. Such a mortgage is deemed to be superior to all other liens or claims against the land.²⁴ We here have recognized the same sort of natural equity, in favor of one who has parted with land without receiving the price, that has given rise to the grantor's lien.²⁵ By far the most important form of intrinsic superiority in this country is that created by record. If A gives a mortgage to B, which is unrecorded, and afterwards a mortgage to C, who takes it without notice and puts it on record, C, by force of the recording acts, becomes a first mortgagee, and so entitled to priority in distribution of the proceeds of the mortgaged property. In many states the same superiority is given to the lien of a judgment creditor: a docketed judgment, in those states is superior

²³ Pomeroy, *Equity Jurisprudence*, §§ 413-417, 678.

²⁴ *Strong v. Van Deursen*, 23 N. J. Eq. 369; *Clark v. Munroe*, 14 Mass. 351; *Weil v. Casey*, 125 N. C. 356, 34 S. E. 506, 74 Am. St. Rep. 644.

²⁵ See § 164.

to the lien of a prior unrecorded mortgage, or of any other prior lien of which the judgment creditor had no notice;²⁶ and in accordance with the principle of § 209, a purchaser even with notice at the execution sale under such judgment obtains a good title.²⁷ In other states a judgment lien is given no such superiority. Such lien is a legal interest, to be sure, but not an estate; and the creditor is not a purchaser, within the recording acts. In these states the judgment is a lien only on such interest as the debtor actually has in the land, and hence is subject to earlier unrecorded mortgages and liens and to such equities as those of reformation or cancellation existing in favor of third parties.²⁸ Whether the purchaser at execution sale under such judgment takes free from equities and unrecorded liens depends upon whether or not his purchase comes up to the ordinary requirements of a bona fide purchase without notice.²⁹

214. Equity inferior because of conduct of holder thereof—Effect of notice.—An equity otherwise superior, because fortified by the legal estate, or because first in order of time, may become inferior because of the fraud or gross negligence of the holder thereof. Thus, B, being about to take a lien on cer-

²⁶ *Harney v. First Nat. Bank*, 52 N. J. Eq. 697, 29 Atl. 221; *A. R. Beck Lumber Co. v. Rupp*, 188 Ill. 562, 59 N. E. 429, 80 Am. St. Rep. 190.

²⁷ *Lusk v. Reel*, 36 Fla. 418, 18 South. 582, 51 Am. St. Rep. 32.

²⁸ *Brown v. Pierce*, 7 Wall. 205 (U. S.), H. & B. 326, 1 Scott, Cases on Equity, p. 708; *Hampson v. Edelen*, 2 Har. & J. 64 (Md.), 3 Am. Dec. 530, 2 Scott, Cases on Equity, p. 708.

²⁹ *Draper v. Bryson*, 26 Mo. 108, 69 Am. Dec. 483; *Pugh v. Highley*, 152 Ind. 252, 53 N. E. 171, 71 Am. St. Rep. 327, 44 L. R. A. 392; *Moyer v. Hinman*, 13 N. Y. 180, 2 Keener, Equity Jurisdiction Cases, p. 344.

tain property, inquires of A, a prior lienholder, whether A already has a lien thereon: A denies that he has a lien, or refuses to disclose it, so that B is induced to loan his money on the property; A is then estopped to assert the priority of his lien. This rule, that an equity may be postponed because of fraud or negligence is of great practical importance in England, but is comparatively seldom invoked in this country, under the recording acts.³⁰ More important is the rule that a subsequent equity, otherwise superior, either intrinsically, or because recorded, or because it accompanies the legal estate, is postponed when it is acquired with notice of the earlier equity.³¹ The converse of this principle, however, is by no means true. The fact that a later equitable interest is acquired *without* notice of a prior one gives it no superiority. If acquired *with* notice, it is inferior; its acquisition without notice merely raises it to a position of equality, and thus gives scope to the maxim, Between equal equities the first in order of time prevails.³² If A contracts to sell land to B and afterwards contracts to sell the

³⁰ *Storrs v. Barker*, 6 Johns. Ch. 166, 168 (N. Y.), 10 Am. Dec. 316; *Heyder v. Excelsior B. L. Ass'n.*, 42 N. J. Eq. 403, 8 Atl. 310, 59 Am. Rep. 49, H. & B. 70; *Northern Counties Ins. Co. v. Whipp*, L. R. 26 Ch. Div. 482 (Eng.), 1 Scott, Cases on Equity, p. 353.

³¹ *Saunders v. Dehew*, 2 Vern. 271 (Eng.), Ames, Cases on Trusts, p. 289; *Mackreth v. Symmons*, 15 Ves. 329, 350 (Eng.), 1 Scott, Cases on Equity, p. 71; *Jackson's Case*, Lane 60 (Eng.), 1 Ames, Equity Jurisdiction Cases, p. 143, 2 Scott, Cases on Equity, p. 471.

³² *Phillips v. Phillips*, 4 De G. F. & J. 208, 215, 216 (Eng.), H. & B. 72, Ames, Cases on Trusts, p. 331, 1 Scott, Cases on Equity, p. 333, 511, LEADING ILLUSTRATIVE CASES. For questions arising from the state of facts, common in England but comparatively rare in this country, where the holder of a later equity, acquired without notice of the earlier, protects himself by getting in the legal estate, see the subject, Trusts.

same land to C, who has no notice of B's contract, C's claim is no better than B's. It is only in the case when C pays the price and acquires the legal title that the doctrine of bona fide purchaser comes into play.

215. Priorities on assignment of things in action, or of a trust fund.—A is a debtor or trustee, B his creditor or cestui que trust. B assigns his claim—the debt, or the interest in the trust fund—first to C, and afterwards to D. Which shall prevail? The simplest answer is, C, since he is first in order of time. This is the view of, perhaps, the majority of the states.³³ But there are serious practical difficulties in the way of the application of the usual rules of priority to this situation. Estates and interests in land may be effectually protected by recording, in this country, or by possession of the title deeds, in England. Title to chattels may usually be protected by possession. But there is no such thing as recording of money claims; and possession of the money is not in the assignor's power to deliver. The rule is established in England, therefore, that the first assignee who takes the natural and obvious step toward obtaining possession, by giving notice of the assignment to the debtor or trustee, A, obtains priority in payment. Such notice amounts to a sort of informal registration of the assignment; not so effective, to be sure, as a public record, for A is under no duty to give information to a would-be assignee regarding prior assignments. This rule is

³³ *Muir v. Schenck & Robinson*, 3 Hill 228 (N. Y.), 38 Am. Dec. 633; *Thayer v. Daniels*, 113 Mass. 129.

followed to a considerable extent in the United States.³⁴

³⁴ Dearle v. Hall, 3 Russ. 1, 48 (Eng.), Ames, Cases on Trusts, p. 323; In re Phillips' Estate, 205 Pa. St. 504, 55 Atl. 213, 97 Am. St. Rep. 743; Graham Paper Co. v. Pembroke, 124 Cal. 117, 56 Pac. 627, 71 Am. St. Rep. 26, 44 L. R. A. 632.

CHAPTER XV.

MAXIMS OF EQUITY AND GENERAL PRINCIPLES OF JURISDICTION.

216. **The maxims.**—Several of the broadest and most general principles are expressed in short sentences known as Maxims. These maxims are all most distinctive and characteristic of the equity system: they vary greatly, however, in their importance, some being applicable to every remedy,—e. g., the maxim “He who seeks equity must do equity”; others being the source of a limited number of rules. A maxim is necessarily too vague a statement to be of much service in the solution of concrete problems, without a great deal of elucidation; but for the student, there is no better way to catch the spirit of our subject than to obtain a sound grasp of these very general principles. It has been said that “he who has grasped them all with a clear comprehension of their full meaning and effects has already obtained an insight into whatever is essential and distinctive in the system of equity jurisprudence, and has found the explanation of its peculiar doctrines and rules.”³⁵ About fifteen maxims have been enumerated; we shall confine ourselves to eleven which we have had illustrated in the preceding discussions. These are, Equity will not suffer a wrong without a

³⁵ Pomeroy, Equity Jurisprudence, § 363.

remedy; Equity follows the law; He who seeks equity must do equity; He who comes into equity must come with clean hands; Equity aids the vigilant, not those who slumber on their rights; Equity acts in personam and not in rem; Equity looks to the intent or substance rather than to the form; Equity regards that as done which ought to be done; Equality is equity; Where there are equal equities, the first in order of time shall prevail; Where there is equal equity, the law must prevail. The last two embody the rules concerning priorities, and have already been explained as fully as our limits allow.

217. **Equity will not suffer a wrong without a remedy.**—This maxim sums up the early history of equity—the motives which brought the court of chancery and the equity system into being. The purpose of the court was the redressing of wrongs for which the common law afforded no remedy whatever, or no remedy adequate to do full justice. Equity, however, never went to the extent of correcting all the harsh and unjust rules of the common law; nor does it today attempt the redress of merely moral wrongs, or the enforcement of merely moral duties. If a man of wealth allows his sister to languish in poverty, he may be guilty of a great moral wrong and justly incur the scorn of society, but equity affords no redress. The maxim, however, is by no means meaningless. It is as true today as it ever was, that the principles and remedies of equity will be extended to cover entirely novel states of fact. However unusual the situation, equity will mould and adjust its remedies to meet the emergency:—

subject, always, to the restraining rule, that the legal remedy is inadequate.³⁶

218. **Equity follows the law.**—This maxim, at first sight, seems to be squarely contradictory of the last. If equity always followed the law, there would be no system of distinct equitable remedies and principles. It is true, however, that outside of the domain of equitable estates and interests, equity in the main adopts the legal rules of the substantive law of contracts and torts. In the specific performance of contracts, for example, the court looks to the rules of the common law to determine whether a valid contract exists; it then applies its own standards to decide whether its peculiar remedy shall be applied. In enjoining a trespass or a nuisance, again, it looks to the law to ascertain whether the threatened act really constitutes a tort or not. Equity never undertook to build up a distinct law of contracts or of torts,³⁷ in rivalry with the common law. The maxim finds a clear illustration in the application to equitable interests of the legal rules of descent and succession;³⁸ yet even here we find a striking exception: in that equitable estates in fee, though subject to curtesy, are not subject to dower.³⁹ The maxim, in fact, amounts to this: that many of the rules which a court of equity is called upon to enforce, in the administration of its reliefs, are rules of the common law, not rules of

³⁶ See the Introductory Chapter.

³⁷ There are some exceptions, such as Equitable Waste: see § 42.

³⁸ *Cowper v. Cowper*, 2 P. Wms. 720, 752 (Eng.), 1 Scott, Cases on Equity, p. 296, Pomeroy, Equity Jurisprudence, § 426.

³⁹ See § 125.

equity proper. If there is a clash between a rule of equity and a rule of law, the former, of course, prevails.

219. **He who seeks equity must do equity.**—Every suit in equity is, or may be subject to the operation of this maxim. Whenever a suitor asks the aid of a court of equity, he must be prepared, as a condition to obtaining relief, to admit and secure to the other party all the latter's equitable claims involved in the subject matter of the controversy. Thus, a vendee, suing for specific performance, must pay or secure the payment of the purchase price, according to the terms of the contract; the vendor, in his suit, must convey such title as the contract calls for: if his title is doubtful, involving the vendee in a possible law suit to defend it, equity will withhold relief.⁴⁰ A person suing to rescind or cancel a deed or contract because of fraud or mistake must return the consideration received, and restore the other party to the situation in which he was before the transaction.⁴¹ A tax payer seeking to restrain the collection of an illegal tax must pay such portion of the tax as is lawfully due.⁴² A striking illustration was the doctrine as to the wife's equity to a settlement, whereby a husband, asking the aid of a court of equity to reduce his wife's property into his possession, was obliged to make a suitable pro-

⁴⁰ See § 24.

⁴¹ *Brown v. Norman*, 65 Miss. 369, 4 South. 293, 7 Am. St. Rep. 663, 2 Scott, Cases on Equity, p. 247, 3 Keener, Equity Jurisdiction Cases, p. 699; *Neblett v. Macfarland*, 92 U. S. 101, 3 Keener, Equity Jurisdiction Cases, p. 693.

⁴² *People's National Bank v. Marye*, 191 U. S. 272, 24 Sup. Ct. 68.

vision for the wife, by way of a separate estate.⁴³ Another instance is the doctrine of marshalling of securities; a person foreclosing a mortgage or lien must avoid an unnecessary injury to third persons having rights in the property inferior to his own.⁴⁴ A plaintiff seeking the aid of equity to establish his title to or claim upon land, on which another in good faith, under a mistake as to the title, has made improvements, will be awarded relief only on condition that he make just compensation for the improvements.⁴⁵ These are merely illustrations among an unlimited number of applications of the maxim.

220. Same subject.—The relief to which the defendant is entitled, by virtue of the maxim, must be connected with the subject matter of the suit; he cannot take advantage of the maxim to assert any and every claim which he may have against the plaintiff, growing out of entirely unrelated transactions.⁴⁶ On the other hand, it is quite possible by the operation of the maxim, for the defendant to obtain a relief that he would not be able to enforce by an independent suit in equity or action at law. This is illustrated by two of the instances in the last paragraph. The wife was awarded a settlement in a suit by the husband, in many cases, where she herself as plaintiff would have no standing in a

⁴³ See § 142.

⁴⁴ See § 159.

⁴⁵ *Williams v. Vanderbilt*, 145 Ill. 238, 251, 36 Am. St. Rep. 486, 494, 34 N. E. 476, 21 L. R. A. 489; *Thomas v. Evans*, 105 N. Y. 601, 12 N. E. 571, 59 Am. Rep. 519.

⁴⁶ *Comstock v. Johnson*, 46 N. Y. 615, H. & B. 26; *City of Chicago v. Union Stock Yards & Transit Co.*, 164 Ill. 224, 45 N. E. 430, 35 L. R. A. 281.

court of equity.⁴⁷ A person making improvements in good faith upon the land of another has as a general thing, no right to bring a suit of his own to recover compensation from the owner, but must await the institution of a suit in equity by the latter.⁴⁸ The maxim, however, is not pushed so far as to enable a court of equity to impose arbitrary conditions upon its suitors.

221. He who comes into equity must come with clean hands.—This maxim, like the last one, is applicable to all equitable remedies, though the occasions for invoking it are hardly so frequent. In its effect it is much more stringent than the last. It does not permit the giving of relief upon terms or conditions, but denies to the plaintiff all relief whatever. It shuts the doors of equity in the face of the suitor whose conduct in the transaction does not measure up to equitable standards. Its application to suits arising from illegal transactions we have already considered.⁴⁹ Similar rules apply to the guilty parties to a fraudulent transaction: such a party cannot sue in equity either to enforce the transaction or to set it aside, or to obtain his share of the proceeds from his associate in the fraud.⁵⁰ In particular, a person who has conveyed or transferred his property in fraud of his creditors cannot come into

⁴⁷ See § 142.

⁴⁸ *Pomeroy, Equity Jurisprudence*, § 1241, note; *Moore v. Cable*, 1 Johns. Ch. 385 (N. Y.). By statutes in many states, the defendant in ejectment may also recover compensation for improvements.

⁴⁹ See § 182; *Dering v. Earl*, 1 Cox Ch. 318 (Eng.), *LEADING ILLUSTRATIVE CASES*.

⁵⁰ *Bartle v. Nutt*, 4 Pet. 184 (U. S.); *In re Bleakley's Appeal*, 66 Pa. St. 187, H. & B. 31; *Kirkpatrick v. Clark*, 132 Ill. 342, 24 N. E. 71, 22 Am. St. Rep. 531, 8 L. R. A. 511.

equity for the purpose of having the transfer set aside.⁵¹ A person or corporation whose trade mark, label, or advertisement is an imposition upon the public, cannot, as we have seen, enjoin the unfair competition of a rival.⁵² The defense of hardship or unfairness in specific performance is a good illustration of the working of the maxim.⁵³

222. Same subject.—The inequitable conduct which debars the plaintiff from relief must be in some way connected with the transaction which is the subject of the suit; just as under the last maxim the “equity” of the defendant which the plaintiff is obliged to recognize must be connected with the transaction. The court does not scrutinize the whole past career of the plaintiff, or his conduct in unrelated matters. A druggist sued to enjoin the operations of an illegal drug trust. The defendants attempted to invoke the maxim by showing that he had sometimes imposed upon his customers by substituting the wrong ingredients in prescriptions. This conduct was held to be too remote from the subject of the suit.⁵⁴

223. Equity aids the vigilant, not those who slumber on their rights—Laches.—This maxim expresses, in somewhat rhetorical form, the defense of laches, or delay, which is invoked in a large proportion of equitable suits. In most states the Statute of Limi-

⁵¹ *Massi v. Lavine*, 139 Mich. 140, 102 N. W. 665, 1 Scott, Cases on Equity, p. 286; *Pride v. Andrews*, 51 Ohio St. 405, 38 N. E. 84.

⁵² See § 57.

⁵³ See § 22.

⁵⁴ *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429, 41 S. E. 553, 90 Am. St. Rep. 126, 57 L. R. A. 547.

tations does not, by its terms, apply to suits in equity. The question whether the plaintiff's delay shall debar him from relief, therefore, is confided to the court's discretion, depending on the circumstances of the individual case. The holdings as to laches vary much with the nature of the suit. Thus, in a suit by a cestui que trust against an express trustee, laches cannot be set up, unless the breach of trust has been brought home to the knowledge of the cestui,⁵⁵ for it is of the essence of the trust relationship that the beneficiary is excused from the duty of vigilance. A party in possession of land may delay as long as he likes before seeking to establish his title, without being chargeable with laches: it is his privilege to wait until his title is attacked, if he sees fit.⁵⁶ The defense of laches does not apply in suits for an injunction to protect a strict legal right, such as suits against nuisances or the infringement of patents.⁵⁷ On the other hand, in the remedy of specific performance, which is largely discretionary, the defense of laches appears to be applied by the courts with more than usual stringency.⁵⁸

224. Same subject.—Many able courts—probably a majority—in recent years have announced a tangi-

⁵⁵ *New Orleans v. Warner*, 175 U. S. 120, 130, 20 Sup. Ct. 44, 44 L. Ed. 96; *Hovey v. Bradbury*, 112 Cal. 620, 44 Pac. 1077.

⁵⁶ *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063.

⁵⁷ *Galway v. Metropolitan Elevated R. Co.*, 128 N. Y. 132, 28 N. E. 479, 13 L. R. A. 788, 1 Ames, *Equity Jurisdiction Cases*, p. 601, 1 Keener, *Equity Jurisdiction Cases*, p. 822; *Ide v. Trorlicht, etc., Co.*, 115 Fed. 137, 148, 1 Ames, *Equity Jurisdiction Cases*, p. 642.

⁵⁸ See § 25.

ble principle on which to decide whether the plaintiff's delay has been excessive. In the view of these courts, the delay is not fatal unless it works a disadvantage to the other party. "So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as estoppel against the assertion of right."⁵⁹ Thus, the delay will constitute laches where it has resulted in the loss of evidence on behalf of the defendant, through the death of his witnesses,⁶⁰ or where "the memories of those who had knowledge of the material facts have become faded and weakened by time";⁶¹ or where the defendant, on account of the delay, has made extensive improvements on the property.⁶² Laches, in this view, becomes a species of unfair conduct, prejudicial to the defendant; and the doctrine thereon a special application of the two maxims, "He who seeks equity must do equity," and "He who comes into equity must come with clean hands." It cannot be said, however, that all the courts, especially the federal courts, have accepted this view.⁶³

⁵⁹ *Chase v. Chase*, 20 R. I. 202, 37 Atl. 804; *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221 (Eng.); 1 Pomeroy, *Equitable Remedies*, § 21.

⁶⁰ *Baker v. Cunningham*, 162 Mo. 134, 62 S. W. 445, 85 Am. St. Rep. 490.

⁶¹ *Lutjen v. Lutjen*, 64 N. J. Eq. 773, 53 Atl. 625.

⁶² *Gibson v. Herriott*, 55 Ark. 85, 17 S. W. 589, 29 Am. St. Rep. 17.

⁶³ *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328; see 1 Pomeroy, *Equitable Remedies*, § 23.

225. **Equity acts in personam and not in rem.**—

The usual meaning of this important maxim was explained in the introductory chapter, together with the changes made by modern statutes.⁶⁴ One important result of the action of equitable remedies on the person should be noticed, by way of review, as it is, perhaps, the most characteristic thing in the whole system. Equity does not permit an unconscientious use to be made of a legal title: that is, a use that is a violation of equitable principles. Equity fully recognizes that A is vested by common law or by statute with a legal estate, but compels him to hold it or use it for the benefit of B, to whom A owes an equitable duty. We have seen this process illustrated in equitable waste;⁶⁵ in the way in which equity treats the Statute of Frauds, as when A is vendor under a land contract which has been partly performed by B,⁶⁶ or holds land by a conveyance from B which was intended as a mortgage,⁶⁷ or on a resulting or constructive trust for B;⁶⁸ in the way in which equity treats the Statute of Wills, where A has obtained by fraud a devise which equitably belongs to B;⁶⁹ or in the doctrine (now accepted by American courts of law) that the recording acts, in spite of their express language, do not protect a purchaser with notice of a prior unrecorded deed or mortgage.⁷⁰

⁶⁴ See §§ 9, 10.

⁶⁵ See § 42.

⁶⁶ See §§ 27-31.

⁶⁷ See § 152.

⁶⁸ See §§ 129-133.

⁶⁹ See § 133.

⁷⁰ See § 205.

226. Equity looks at the intent or substance, not at the form.—We have had several important illustrations of this maxim. The seal has not the importance in equity that it has, or had, at common law. Thus, equity does not specifically enforce an agreement without a consideration, though the agreement is under seal and hence binding at common law.⁷¹ An instrument intended to be a mortgage, but defective as a legal conveyance from lack of a seal or for other reason, may be treated as creating an equitable lien;⁷² similarly, a defective deed may be treated in equity as a contract to convey.⁷³ The doctrine as to penalties and forfeitures;⁷⁴ as to the equity of redemption;⁷⁵ and especially as to the absolute deed treated as mortgage,⁷⁶ are further examples. Equity, as a whole, is characterized by an absence of the formalism which marked the common law until very recent times, and still marks it, to a large degree. Excessive attention to forms and ceremonies is a trait of primitive systems of law; it is the absence of this in equity which gives it much of its modern and scientific character.

227. Equity looks on that as done which ought to be done.—This maxim has been mentioned as summing up the doctrine of equitable conversion in both its forms—that resulting from a contract for the sale of land,⁷⁷ and that resulting from a direction in a

⁷¹ See § 18.

⁷² See § 162.

⁷³ *Sparks v. Woodstock Iron, etc. Co.*, 87 Ala. 294, 6 South. 195.

⁷⁴ See § 188.

⁷⁵ See §§ 148-150.

⁷⁶ See § 152.

⁷⁷ See § 36.

will or otherwise that land be sold and turned into money, or that money be invested in land.⁷⁸ These are the most important instances that are clearly to be referred to this maxim. Two other cases may serve to illustrate its effect. A contracted to become a citizen of London, but died before the agreement was formally carried out. By the customs of London, the estates of its deceased citizens were distributed in an entirely different manner from that prescribed by statute for other parts of England. The court, on the suit of his widow, distributed his estate in accordance with the London custom, as if he had already become a citizen.⁷⁹ B agrees to execute a mortgage to C on certain land. The contract is treated, in fixing C's rights, as if it had already been carried into effect, and C is given an equitable lien on the land.⁸⁰

228. Equality is equity.—A few examples will illustrate the application of this maxim. Whenever as the result of an equity suit there is a fund to be distributed among several claimants, and it is not large enough to satisfy all claims, it will be distributed *pro rata*; unless, of course, some of the claims are secured and others are unsecured. The maxim, therefore, is applied in the settling of the affairs of an insolvent partnership or corporation, and in creditors' suits in behalf of more than one creditor. In

⁷⁸ See § 143.

⁷⁹ *Frederick v. Frederick*, 1 P. Wms. 710 (Eng.), 1 Scott, Cases on Equity, p. 311. See also *Sourwine v. Supreme Lodge*, 12 Ind. App. 447, 40 N. E. 646, 54 Am. St. Rep. 532, 1 Scott, Cases on Equity, p. 320, LEADING ILLUSTRATIVE CASES.

⁸⁰ See § 162.

administering the estates of deceased persons, equity at an early date disregarded the common law preference given to bond or specialty creditors. So, where there is a single claim against several debtors, equity if it has jurisdiction will apportion the burden among them, or if one is compelled to pay more than his share, will give him the remedy of contribution against the others.⁸¹ Thus, legacies or devises of the same class abate proportionally for the payment of debts. The maxim is also illustrated by the tendency of equity to prefer an ownership in common to joint ownership, and a joint and several to a joint liability. Its rules on these subjects have to a large extent been incorporated in modern statutes.⁸²

229. Inadequacy of remedy at law as test of jurisdiction.—In conclusion, we may review, briefly, the general principles by which are determined the question whether equity will take jurisdiction of a case. The cardinal rule, as we saw at the beginning,⁸³ is that equity will not take jurisdiction where the legal remedy is full, adequate, and complete. Often this question cannot arise, since the law affords no remedy whatever, as in cases to enforce an equitable interest—such as a trust—which the law knows nothing of. But in a majority of cases this preliminary question must first be settled; and it is frequently a question of difficulty.⁸⁴ There is no general test of adequacy of the legal remedy; each rem-

⁸¹ Pomeroy, *Equity Jurisprudence*, §§ 406, 407, 410, 411; and § 422, as to contribution.

⁸² Pomeroy, *Equity Jurisprudence*, §§ 408, 409.

⁸³ See § 12, and following.

⁸⁴ E. g., *Cancellation of instruments*, § 65.

edy, as we have seen, has its own set of rules. The inadequacy may consist in the difficulty of ascertaining damages; in the fact that damages, when ascertained and paid, do not truly compensate; in the fact that the legal procedure does not afford protection from unjust suits (interpleader), or that the suitor is in danger of losing his rights through loss of evidence; or that if left to the law, he will be involved in a multiplicity of suits. The special rules of equity on the subject are rarely arbitrary; sometimes, for simplicity's sake, the court tests the case not on its individual merits, but on the merits of the class to which it belongs;⁸⁵ usually it takes each case as it comes, and compares the equitable remedy sought with the available legal remedies in a spirit of practical common sense, guided, but not hampered, by precedents.

230. Jurisdiction, once taken, extends to the whole controversy.—This principle we have already had illustrated several times; it is of constant application, in nearly every kind of suit. Thus, if the court has taken jurisdiction to enjoin waste⁸⁶ or nuisance⁸⁷ it may, in addition to issuing the injunction, retain the case and award damages for the past injury, though these damages could be obtained in a separate action at law. The legal remedy is inadequate in that it requires a separate proceeding, in addition to the equity suit. So, in an action to

⁸⁵ E. g., the rule that land contracts may be specifically enforced, though in the individual instance damages sometimes might be an adequate remedy; § 13.

⁸⁶ See § 41.

⁸⁷ See § 50.

reform an instrument the court often retains the case for recovery of the amount due upon the instrument, or for other relief.⁸⁸ It is seldom, however, that equity awards damages alone. An instance of importance is where the plaintiff's suit for specific performance fails without his fault. A sues B to compel B to comply with his contract to convey Blackacre. Meanwhile, before A's suit was begun, B had rendered specific performance impossible by conveying Blackacre to C, a bona fide purchaser for value. A, at the time he began suit, knew nothing of this conveyance, and had no reason to suppose that the legal title was not in B. As A has begun his suit for a remedy, now impossible, in perfect good faith, equity will not turn him out of court, but will retain his suit for the purpose of awarding damages for B's breach of contract.⁸⁹ If, however, A was aware, at the time he began suit, that specific performance was impossible, equity will not retain the case.⁹⁰

231. Jurisdiction of a subject, once existing, is not lost by the enlargement of legal jurisdiction.—Where the courts of law have extended their jurisdiction over a subject which once belonged exclusively to the jurisdiction of equity, the jurisdiction of equity is not thereby destroyed. We have seen this rule illustrated in the remedy of contribution between

⁸⁸ *Bidwell v. Astor Insurance Co.*, 16 N. Y. 263; *Kelly v. Galbraith*, 186 Ill. 593, 58 N. E. 431.

⁸⁹ *Milkman v. Ordway*, 106 Mass. 232, 253, 1 Scott, Cases on Equity, p. 119; *Combs v. Scott*, 76 Wis. 662, 45 N. W. 532, 2 Keener, Equity Jurisdiction Cases, p. 1194, H. & B. 682, 2 Scott, Cases on Equity, p. 357.

⁹⁰ *Hatch v. Cobb*, 4 Johns. Ch. 559 (N. Y.), 2 Scott, Cases on Equity, p. 343.

sureties.⁹¹ Further, even where the power to grant a remedy is conferred upon the courts of law by statute, the equity jurisdiction which depended upon the absence of such a remedy is not taken away, unless that appears to be the clear intent of the statute.⁹² Thus, statutes give the courts of law power to grant a new trial where a judgment has been obtained by fraud or accident; this has not abolished the jurisdiction to enjoin such judgments.⁹³ Actions to recover at law upon lost instruments are authorized by statute, but suits in equity for the same purpose are still entertained.⁹⁴ Even the bill for discovery, it is generally held, is not abolished by the modern reforms in the law of evidence.⁹⁵

⁹¹ See § 99.

⁹² *Sweeney v. Williams*, 36 N. J. Eq. 627, 1 Scott, Cases on Equity, p. 141; *Darst v. Phillips*, 41 Ohio St. 514.

⁹³ See § 64.

⁹⁴ See § 172.

⁹⁵ See § 116.

BIBLIOGRAPHY.

Story's Equity Jurisprudence (2 vols.), after a lapse of about seventy-five years, is still a standard work. It presents the results of the English cases up to its date with all its famous author's learning, gracefulness of literary style, and entire absence of originality. It is one of the few American law books that are frequently cited by the English courts. *Bispham's Equity* (1 volume), about forty years old, is a clear and careful outline, somewhat too condensed, perhaps, but much in use as a text book for students.

Professor *Langdell's* learned articles in the *Harvard Law Review*, Vols. I and the following, are, perhaps, more likely to attract the scholar than the student or practitioner. There are several standard text books on various topics of Equity, but all are books of reference for the lawyer rather than texts for the student. Among them are *Fry* on Specific Performance (English); *Pomeroy* on Specific Performance; *High* on Injunctions; *Perry* on Trusts; *Jones* on Mortgages. Of more interest to the reader are the various case books used in law schools. Unfortunately, none of them covers the whole range of important equity topics; the ones most in use treat of very few topics indeed. *Hutchins' and Bunker's Cases* is the most comprehensive in the subjects treated. *Keener's Cases*, in three large volumes, treats of Specific Performance, Rescission, Reformation, and a few other remedies. *Ames' Cases* (2 vols.) covers much the same ground, but more briefly, and with notes of great value. There is also a collection of cases by *J. B. Scott*. Parts of the subject are treated in case books on Trusts, by *Ames*; on Mortgages, by *Wyman* and by *Kirchway*; in *Gray's Cases on Property*, Vol. VI; and elsewhere.

QUIZ QUESTIONS

EQUITABLE RIGHTS AND REMEDIES

(The numbers refer to the numbered sections in the text.)

1. What is equity? Contrast it, in three respects, with the common law.
2. What were the two chief reasons that made a court of equity necessary? When was this?
3. How did the court of chancery come to be established? Describe its early history.
4. What states have separate courts of chancery? What is meant by the "code" states, and how is equity administered in them? How in the other states? Where does England come in this classification?
5. Comment on Selden's famous remark about equity.
6. Explain why the element of vagueness in some principles of equity has its advantages.
7. What two meanings are given to the term, Concurrent Jurisdiction?
8. Contrast equitable with legal remedies.
9. What is meant by the maxim, "Equity acts in personam"? Give two illustrations.
10. Explain what changes have been made in the effect of the maxim by statute.
11. What is specific performance of contracts?
12. What is the principle as to adequacy of the legal remedy? Explain carefully, by example, its application in specific performance.
13. Explain the application of the principle to land contracts.
14. State two or three cases (other than those in the text) in which, in your opinion, specific performance of a contract relating to personal property should be allowed.
15. Why are contracts for personal services or for continuous

- acts not specifically enforced, as a general rule? State two cases (other than those in the text) where, in your opinion, an exception should be made; and explain why.
16. Explain how equity indirectly enforces some contracts by injunction.
 18. State the point of difference between equity and law as to the necessity of consideration. What is the effect in equity of an inadequate consideration?
 19. State a point of difference between equity and law as respects the effect of misrepresentation.
 20. State a case in which the vendee's failure to disclose a fact not known to the vendor should, in your opinion, defeat his right to specific performance.
 21. State two cases where, in your opinion, a unilateral mistake should be a defense to specific performance.
 23. Frame two or three cases where lack of mutuality would be a good defense to specific performance. Discover, if possible, instances where lack of mutuality existed when the contract was made, and the defense in question was not allowed.
 24. Frame, if possible, two cases where a doubt as to vendor-plaintiff's title (not an admitted lack of title) will defeat specific performance; explain why.
 25. Explain what is meant by the phrase, "Time is not of the essence of the contract." Suppose a party waits ten years before suing.
 26. State four ways in which time may become essential.
 27. What is meant by the doctrine of part performance of parol contracts? On what two ideas is it based?
 28. Is payment a sufficient act of part performance? Give two reasons.
 29. Is taking possession a sufficient act of part performance? Give two reasons.
 30. Is continuing in possession a sufficient act of part performance? Give two reasons.
 31. When may personal services be a sufficient act of part performance? Explain.
 32. Invent a case where the vendor may have partial specific performance with abatement from the price, and a case

where he may not; a case where the vendee may have the same, and a case where he cannot.

33. When may a vendee have specific performance as against one to whom the vendor has conveyed the legal title?
34. Against whom may covenants in deeds restricting the use of land be enforced? By whom?
35. Show how the defense of hardship may apply in the enforcement of such covenants.
36. What is the effect in equity of the contract for purchase and sale of land upon the property rights of the parties in the land? What maxim is involved? What result when the vendor dies? When the vendee dies?
37. What is meant by the vendor's lien? How is it enforced? What is the effect of the vendor's assigning his claim for the unpaid purchase price?
38. What is the duty, with respect to care of the premises, of the vendee in possession? Of the vendor in possession? What is the result of accidental destruction of the premises by fire?
39. Review the thirteen general doctrines or principles of equity which have been illustrated in the paragraphs on specific performance, and show how each is applied.
40. What are preventive, mandatory, final, preliminary injunctions?
41. Distinguish waste from trespass. Mention some instances of waste that will be enjoined. When may an accounting for waste be had in equity, and what general principle of jurisdiction is illustrated?
42. Explain what is meant by equitable waste.
43. On what grounds will equity enjoin trespass? State three imaginary cases, each involving one of these grounds.
44. In a suit to enjoin trespass, what happens where the title to the land is in dispute?
45. When may a mandatory injunction be had in trespass cases?
46. Give two imaginary cases where an injunction would lie against trespass to personal property.
47. When does injunction lie against a nuisance?
48. When is a trial at law necessary in a suit to enjoin a nuisance?

49. State what is meant by "balancing the injuries" on motion for a preliminary injunction; and if possible, illustrate.
50. Criticize the practice of balancing the injuries as applied to final injunction against nuisance. What should be done when copper smelters, the chief industry of a large town, ruin the vegetation on neighboring farms?
51. What is the effect of delay on injunction against nuisance? When will a mandatory injunction be given?
52. Who may enjoin a public nuisance?
53. What are the chief questions involved in a suit to enjoin the infringement of a patent? Why does the court not send these questions to a jury for trial?
54. In such suit, what showing must plaintiff make to warrant an injunction before trial?
55. In a suit for infringement, what is an accounting of profits? When may it be had, and when not?
56. In a suit for injunction against infringement of copyright, must plaintiff show damages? How does the "clean hands" maxim apply? State some instances of enjoining publication of uncopyrighted literary property.
57. Why should the copying of a trade mark be enjoined? State facts of three imaginary cases where "unfair competition" should be enjoined. Illustrate the application of the "clean hands" maxim.
58. What about enjoining libels? Torts by striking workmen? What of the objection that the acts are crimes?
59. State three propositions as to injunctions against state officers. What is the remedy in equity when the board of supervisors of a city are threatening illegal or fraudulent acts, and on what grounds is it based?
60. State two grounds on which improper taxation may sometimes be enjoined.
61. Can a railroad which is about to take property without condemnation proceedings be enjoined? Why? When will injunction lie against a railroad which is authorized to lay its tracts in a public street?
62. Give three instances of injunction in aid of other equitable remedies.
63. What may a person do who is sued at law and has a de-

fense recognized only by courts of equity? How is it in the "code" states?

64. Mention a case of an injunction against a judgment at law obtained by accident; obtained by fraud. What important exception is there to the enjoining of fraudulent judgments? Explain why.
65. What is the remedy of cancellation? Suppose the defense to the instrument appears upon its face? Suppose the instrument is negotiable?
66. What is the state of the law as to cancellation when the defense does not appear on the face of the instrument, which is non-negotiable?
67. What is reformation? When may it be had? Give an illustration in addition to that of the text.
68. Give another instance of reformation for a mistake of one party known to the other.
69. Give three other examples of situations where reformation for mistake cannot be had.
70. Give three other instances, parallel with those of the text, where rescission for mistake may be had.
71. Give an instance where rescission for mutual mistake cannot be had.
72. Give an instance of unilateral mistake for which there is no relief.
73. Give another example of unilateral mistake in making the contract for which there can be relief.
74. State and illustrate three propositions as to mistake in gifts.
76. Give an example of a mistake of law which cannot be relieved against. What is the policy of this rule?
77. State, if possible, another case of reformation for mistake of law.
78. State, if possible, a case of mistake of law with inequitable conduct of the other party.
79. State, if possible, a case of mistake as to a party's existing rights; and explain the rule.
80. What exception is there to the last rule?
81. What is the state of the law as to a mistake of law in making a gift?
82. State and explain the case in the text, and, if possible, an-

- other case, where there are proceedings at law by numerous parties against one person, each involving the same question.
83. State and explain the four cases in the text; suggest, if possible, similar cases.
 - 84-85. State and explain the four cases in the text; if possible, suggest similar cases.
 86. State and illustrate the limitation on the principle of the last four sections. See if the illustrations you have made to these sections comply with this limitation.
 87. State and give a new illustration of what is meant by a cloud on title.
 88. When is plaintiff, in a suit to remove a cloud, required to be in possession, and when not? Reasons?
 89. Explain and illustrate the rule that an instrument invalid on its face is not a cloud, applying the test mentioned in the text. Criticize the rule.
 90. What is the statutory suit to quiet title; how does it differ from a suit to remove a cloud; when is it legal and when is it equitable?
 91. What is the purpose of a suit for partition? Suppose the title of one or more of the parties is disputed?
 92. Give a new illustration of what is meant by "owelty of partition."
 93. When may a partition sale be had?
 94. When may a partition of personal property be had?
 96. For what three purposes may creditors' suits be brought, and what is the advantage of the suit in each of the three cases?
 97. How far must the creditor proceed at law before bringing the suit in equity?
 98. Exoneration: what two meanings?
 99. Give example of the remedy of contribution; what advantages has it over the remedy at law? What maxim does it illustrate?
 100. What are the advantages of the equitable remedy of accounting? Mention five situations in which it may be had.
 101. When may accounting be had between principal and agent?
 103. Give another example of a case where, in your opinion,

interpleader may be had. What are the advantages of the remedy? Describe the procedure briefly.

104. State, if possible, another case where the rival claims are not for the same thing, debt or duty.
105. State, if possible, another case where the plaintiff is not a mere stakeholder.
106. State, if possible, another case where there is no privity between the claimants. Criticize the rule.
107. State, if possible, another case where the plaintiff is under an independent liability to one of the claimants. Criticize the rule.
108. What is a receiver? What are the general principles governing his appointment?
109. When may a receiver be appointed in a suit to foreclose a mortgage, and for what purpose? Mention three other common cases where a receiver is proper.
110. Mention four cases where a corporation receiver may be appointed, without statutory authority.
111. What happens when the receiver's possession is interfered with? Why? Give three instances of such interference.
112. What happens when suit is brought against the receiver without leave of court?
113. Describe the receiver's duty as to management of the property. What are receivers' certificates?
114. Describe preferred claims in railroad receiverships. On what theory do they rest?
115. What is discovery in an equity suit, and what is the bill for discovery?
116. What modern statutes have affected the bill for discovery and how?
117. What were the suits for the examination of witnesses?
118. Describe equitable estates. Review fully the equitable interest of the vendee of land.
119. Describe uses.
120. What was the Statute of Uses, and when was it passed? What effect was given to it by the courts?
121. Classify trusts. What is a passive trust?
122. What are express active trusts, and what are some of their commonest purposes?

123. Who brings actions at law relating to the trust property?
124. Describe "spendthrift" trusts.
125. What happens on the death of a cestui que trust who has an interest greater than a life estate?
126. Distinguish between private and charitable trusts, and give two other illustrations showing the distinction.
127. Give three other examples of charitable trusts for various purposes.
128. How must an express trust in lands be proved? Illustrate.
129. What are the distinguishing features of resulting and constructive trusts?
130. Give an example of each of the two classes of resulting trusts. What is the effect of a man's purchasing property in the name of his wife?
- 131-132. Give four examples of different species of constructive trusts.
133. What is a trust ex maleficio? Give two examples.
134. Mention three duties of an express trustee. What should he do if in doubt as to his duties?
135. Mention four rules as to trustee's duty of care and diligence. How should he invest the trust funds?
136. What compensation is the trustee entitled to?
137. Give four examples of removal of a trustee, and four of the appointment of a trustee by the court.
138. Describe how corporation directors may be sued for breach of trust, giving reasons.
139. What is the equitable separate estate of a married woman? Who is the trustee?
140. What is her power to dispose of it, and to make contracts, under the English system?
141. What was the restraint upon anticipation?
142. What was the wife's equity to a settlement?
143. Give two illustrations of equitable conversion (other than that arising from contract of sale).
144. What is reconversion? When is it not allowed?
145. Why has equity less jurisdiction over the administration of estates of decedents in this country than in England?
146. Describe the jurisdiction over infants.
148. What was a mortgage, at common law? What was the

- equity of redemption? What was the duty of the mortgagee in possession? What was foreclosure?
149. Mention two points of difference between the English mortgage system and the system in the "title theory" states.
 150. Describe the system in the "lien theory" states. How about the mortgagee's possession in such states?
 151. Describe foreclosure by sale. What title passes? What about a deficiency or a surplus?
 152. Distinguish between a conveyance with option to repurchase, and a mortgage. When will a deed, absolute on its face, be treated as a mortgage? On what theory?
 153. What is the effect of the assumption of the mortgage debt by the mortgagor's grantee? State and illustrate fully the relation between such grantee, the mortgagor, and the mortgagee.
 154. What is the effect of assigning the debt secured by the mortgage? Suppose the debt is evidenced by a negotiable note?
 155. What is meant by the sentence, "Once a mortgage, always a mortgage"? Illustrate. What is the reason for the rule? What is the effect of a sale of the equity of redemption to the mortgagee?
 156. Who may redeem from the mortgage? How?
 - 157-158. Give five illustrations of subrogation. Explain fully.
 159. Explain marshaling of securities.
 160. Explain the inverse order of alienation rule.
 161. Describe an equitable lien.
 162. Give three examples of an equitable lien.
 - 163-164. Distinguish the grantor's from the vendor's lien.
 165. State three restrictions, generally recognized, on the grantor's lien.
 166. Distinguish the grantor's implied lien from the grantor's reserved lien.
 168. Explain assignment by order upon a fund.
 169. Explain and illustrate assignment of expectancies.
 170. Illustrate sale or mortgage of after-acquired property. What effect at law?
 171. State two cases where equity will relieve from the effects

- of accident, and one where it will not. How did equity come to have jurisdiction of suits on lost instruments?
173. State Lord Hardwicke's classification of frauds. What important difference between the legal and the equitable rules as to misrepresentation?
- 174-175. What is the effect of non-disclosure of secret information by a party entering into a contract? Of active concealment?
176. What is the effect of inadequacy of consideration in equity?
177. State three propositions as to the effect of deficiency in mental ability; three propositions as to the effect of intoxication.
178. How does equity treat the contracts of expectant heirs and reversioners?
179. What is undue influence?
180. State three rules of presumption as to the validity of transactions between persons in a fiduciary relation. State eight instances of such relation.
181. When does ratification of or acquiescence in a fraud defeat relief?
- 182-183. State the *in pari delicto* rule, and three limitations or exceptions. Invent an illustration of each.
- 185-186. State the six elements of equitable estoppel. Invent another illustration, and show how it complies with each of these elements.
187. State two applications of the principle of estoppel, supplying facts for the rules of the text.
188. State the ground of the doctrine as to penalties and forfeitures.
189. Give one other example of a penalty, and two of liquidated damages.
190. State three rules on the subject of relief against forfeitures.
191. Give another case illustrating and explaining the doctrine of election.
192. Give another illustration of election where the donor has a partial interest.
193. State the rule of equity, and of the statutes, as to election by a widow concerning her dower.

- 194-195. State and illustrate the four classes of satisfaction. Which is most important? Explain fully the theory of the third class.
196. Distinguish between notice and knowledge.
197. What is actual notice? Explain putting on inquiry. Give, if possible, two other examples.
198. What information does, and what does not, put on inquiry? Illustrate, if possible.
199. Explain notice by possession.
200. State, with reasons, effect of notice of possession by a tenant; of possession by grantor; of possession not exclusive. Illustrate each.
201. What is notice by *lis pendens*? Reason for it? When does it begin and end? In what suits?
202. What is a chain of title? Give another illustration of notice by express reference therein, and state the two cases in the text of notice inferred.
203. How does a recording act usually read? What effect? What is the effect of the recording officer's mistake? Reasons? Of the destruction of the record?
204. Explain the rule that the record does not act as notice retrospectively; the rule as to a break in the chain of title.
205. Explain the effect of other notice in place of a record.
206. What is the rule as to notice to an agent? Reason? Effect of notice received in a former transaction?
207. What is meant by valuable consideration in the law of bona fide purchaser? Is an antecedent debt a valuable consideration?
208. Is a promise to pay ever the equivalent of payment? Reasons? What is the effect of part payment before notice?
209. What is the effect of purchase with notice from a bona fide purchaser? Exception? Reasons for rule and exception?
210. State three rules on the subject whether a quitclaim grantee can be a bona fide purchaser.
211. In what classes of suits might the defense of bona fide purchaser be set up, before the recording acts? What suits have the recording acts, as interpreted, added? Have they enlarged the jurisdiction of equity?
212. On what maxims is the doctrine of priorities based? Show what use is made of them.

213. What is the peculiarity of a purchase money mortgage? How do we ascertain the priority between a docketed judgment and an earlier unrecorded mortgage? Between a purchase at execution sale and an earlier unrecorded mortgage?
214. Show the effect of fraud on the part of the holder of a superior equity. The effect of notice by the holder of a later equity, and of lack of notice.
215. How are priorities between rival assignees of a thing in action determined?
216. State the eleven maxims.
217. What is the meaning of the maxim, "Equity will not suffer a wrong without a remedy"? Review §§ 1-8.
218. What is the meaning of the maxim, "Equity follows the law"? Review the paragraphs referred to.
219. What is the meaning of, "He who seeks equity must do equity"? Invent three additional examples, if possible.
220. State the two cases of this paragraph. What do they show as to the effect of this maxim?
221. What difference between the "clean hands" and the "do equity" maxims? Review the paragraphs referred to. Give five illustrations of the maxim.
222. Give another illustration of the limitation on the "clean hands" maxim.
223. Explain laches in suits (1) by cestui que trust, (2) by a person in possession of the land, (3) for injunction against nuisance. What rules?
224. State the underlying principle as to laches here laid down. State and explain three instances of laches in accordance with this principle.
225. Review all the references.
226. Review all the references.
227. What does this maxim mean? Review the references.
228. Give two applications of the maxim, "Equality is equity."
229. Make a full summary of all the special rules, in each remedy, relating to the inadequacy of the legal remedy.
230. Review the references in the notes. State the rules on the subject of damages in place of specific performance.
231. Review the references in the notes.

PART II

ATTACHMENT AND GARNISHMENT

BY

OLIVER A. HARKER, A.B., A.M., LL.D.*

ATTACHMENT

CHAPTER I.

ORIGIN AND NATURE OF THE REMEDY—GROUNDS FOR ATTACHMENT.

1. **Definition.**—In its most comprehensive sense attachment means the act or process of taking into custody the body or property of a person and holding the same to abide the order or judgment of a court. It may be used to compel the appearance of the defendant, in which case the process used is called a *capias*; or it may be used to seize his property and hold it for the satisfaction of a debt he owes and is sued upon, in which case the process commands the officer to levy upon the property of the defendant to a certain amount and hold it to abide the future order of the court.

* Former Dean, University of Illinois Law School. Former Judge of the Appellate Court of Illinois; former President of the Illinois State Bar Association.

2. **Origin.**—Attachment against the person is a common law writ. It was used in the English Court of Common Pleas from the earliest organization of that court. Attachment against property was unknown to the common law. It had its origin in the civil law, and by local custom came into use in London and other commercial centers of England about nine centuries ago. In the United States the attachment rests entirely upon statutory enactment, and every state has made some provision regulating it. It is not the present purpose to consider the law of attachment with reference to the person, but this article will be confined to a consideration of the principles and provisions of the statutory law of this country regulating the taking and holding, under judicial process, the property of the debtor to the end that it may be used to satisfy any judgment which his creditor may recover against him.

3. **Subject to strict construction.**—Being in derogation of the common law the remedy is never extended by implication, and in the absence of express legislative sanction to construe liberally, the courts have quite uniformly construed the statutes strictly, in favor of those against whom the proceeding is employed, both as to subject matter of the attachment and method of enforcement.¹ What is meant by that is that the plaintiff who seeks the remedy must comply with the requirements of the statute in all the steps taken by him, and if he neglects any of them the remedy will be denied.

¹ Keeley Brewing Co. v. Carr, 198 Ill. 492, 64 N. E. 1030; Faul v. Beucus, 124 Mich. 25, 82 N. W. 659; Lederer v. Rosenthal, 99 Wis. 235, 74 N. W. 971.

4. **Manner of treatment.**—Although diverse local conditions have naturally led state legislatures to enact laws of attachment dissimilar in many minor particulars, there is great similarity in the leading features of the enactments and a quite uniform trend in judicial construction.

The subject will be treated in the following order:

1. Who may use the remedy. 2. Against whom it may be used. 3. Grounds for attachment. 4. Affidavit. 5. Bond. 6. Writ and return. 7. Custody of attached property. 8. Notice to the defendant and proceedings in court. 9. Sale of attached property and disposition of proceeds.

5. **Who may use the remedy.**—It was originally allowed only to creditors who, in a civil action, sued for the recovery of money due upon a contract, express or implied. It was not allowed in tort actions. The theory was that contractual relations should exist between the parties, and that the creditor, to avail himself of the remedy, must hold a claim for money then due and payable from the debtor. At this time, in the absence of express provision, attachment will not lie on demands based upon a tort. In some of the states the remedy is so extended by statute to include them. In those states so providing, the tort demands are usually those which arise from the wrongful conversion of personal property or injuries thereto in consequence of negligence, fraud, or wrongful act, but in a few states the remedy is extended to actions to recover unliquidated damages for injury to person in suits already pending and commenced by summons or *capias*. It may be observed, however, that in

practice resort to attachment is rare in actions for tort, and that the great majority of the cases in which it is used are *ex contractu* and where the demand is for a fixed sum.

6. **Same subject.**—The right is not limited to a party original to the contract. It may be exercised by an assignee, an administrator, a conservator, or any person who, in a representative capacity, has the right to sue in law upon the demand. Copartners, tenants in common, joint tenants and corporations may resort to it. Although the right by some early statutes was limited to residents of the state, it is now quite generally provided that it may be exercised by persons not being within the state, and even by persons not citizens of the United States, provided they be of a class entitled to sue in the courts of this country.

7. **Against whom the remedy may be used.**—From what has been said it is apparent that the remedy, as a general rule, can only be enforced against the property of a person who stands in the relation of debtor to the plaintiff in the action. Whether the indebtedness must be one that is due at the time of suing out the writ, or one that may thereafter become due, depends wholly upon the local statute. When the action for the recovery of the debt is against partners the proceeding may be against partnership property. Where the action is against several, who are jointly and severally liable for the debts as partners or otherwise, an existing ground of attachment against one will not support an attachment of the property of any of the others against

whom there are no grounds of attachment alleged. As a general rule, the property of an unmarried woman is amenable to attachment, as is the property of a married woman in those states where, by statute, they may enter into contracts independent of their husbands. Private corporations are liable in attachment upon the same causes of action and upon the same grounds that prevail against individuals. It should be noted, however, that the courts are not entirely harmonious in cases against foreign corporations doing an interstate business, where the ground of attachment alleged is non-residence.

8. **Same subject.**—In the absence of express statutory authority, property held by administrators, executors, or guardians, may not be reached by creditors on attachment. Such remedy is obviously inconsistent with the administration of the assets of an estate or with the management of a ward's property. Trustees, receivers, and others holding property by virtue of court appointment are ordinarily not subject to the remedy. The property of a municipal corporation, such as a county, city or village, is not liable to attachment, for the same reason that precludes the sale of its property on execution. Judgments against it are usually satisfied through assessment and collection of taxes ordered and made by the officers of the corporation.

9. **Grounds for attachment—Classification.**—Ordinarily a debtor is allowed to possess and enjoy his property without interference on behalf of his creditor until it has been judicially determined what and how much his indebtedness is. Judgment, formally

rendered by a court of competent jurisdiction after the debtor has had an opportunity to be heard, and an execution, formally issued from the judgment, must precede the taking of his property to satisfy the indebtedness. Inasmuch as attachment allows the taking of the debtor's property before a judicial determination of the nature and amount of the indebtedness, it has been aptly called an extraordinary proceeding. The different states have undertaken to declare the conditions under which that extraordinary proceeding may be availed of. They are termed the grounds of attachment, and are based upon the inadequacy of ordinary process. They may be divided into three general classes: A. Where the debtor has placed himself in such a position that he cannot be reached by personal summons. B. Where he has made, or is about to make, such disposition of his property that it cannot be reached by ordinary execution. C. Where the debt which is the subject matter of the litigation was fraudulently contracted by the debtor.

10. **Non-resident debtors.**—There is general uniformity now in the states of the Union authorizing attachment against the property of non-resident debtors. The principle is thereby recognized that property is subject to the jurisdiction of the state though its owner may reside out of it, and this does not involve any turpitude on the part of the debtor beyond that incident to his refusal or neglect to pay his debts. The statutes are not uniform in phraseology, however. In some of the states the words employed are, "When the defendant is a non-

resident of this state;" in others, "When the defendant is not an inhabitant of this state;" "When the defendant resides out of the state," and the like.

It is not necessary that the debtor have residence or place of abode in some other state or country. He may be a constant traveler having no fixed place of abode. The prominent idea underlying this authorization is that the defendant, because of his non-residence, is beyond the reach of the state's ordinary process. As to whether the non-residence must be permanent as distinguished from temporary, is a question on which courts are not harmonious. In a few states the courts incline to the view that temporary absence because of business or pleasure does not render a debtor amenable to the statute, but the sounder rule, it would seem, is that his property is attachable if his absence is protracted beyond reasonable limits and his residence is not such as to subject him personally to the jurisdiction of the court and place him on an equality with other residents in that respect.

11. **Absconding debtors.**—Quite uniformly, also, the states provide for attaching the property of absconding debtors. A party absconds in a legal sense when he hides, conceals or absents himself clandestinely with intent to avoid the service of legal process. In his case the question of residence, his presence in or absence from the state, is immaterial. He may be an absconding debtor without departing from the limits of the state. If he remains in hiding or shuts himself up from his creditors he is an absconding debtor, the gist of the charge being that by his

own act he has rendered, or will render, ordinary process ineffectual. But the mere fact that he does not live within the county where he does business, or where the debt is payable, does not amount to "concealing" himself. The plaintiff sued out an attachment from an Illinois county alleging in the affidavit "that the defendant conceals himself and evades the officer so that ordinary process of the law cannot be had or served upon him." The evidence showed that the defendant, having a residence in Wayne County, carried on a mercantile business through others in Clay County, where the writ was sued out. He rarely went to Clay County, but frequently went to St. Louis on legitimate business connected with the store, and with no purpose of evading service of process. It was held that there was no cause for attachment.² In some of the states a debtor who stands in defiance of an officer so that process cannot be served upon him, is treated as an absconding debtor, and in a few it is sufficient to show that the debtor is about to abscond.

12. Fraudulent disposition of property.—Having considered the grounds of attachment because of the debtor's placing himself beyond the reach of personal summons, the next grounds to be considered are those which may exist by reason of the fraudulent disposition of his property or the intended disposition of it. The conveyance of a debtor's real estate made with the fraudulent purpose of hindering and delaying his creditors, and the transfer, concealment or disposition of his personal property

² Boggs v. Bindskoff, 23 Ill. 66.

made with a like fraudulent purpose, are causes for attachment in all of the states. The courts generally hold that such transfer, in order to be fraudulent, must have been made after the creation of the indebtedness, unless, when made, the debtor intended to contract the particular debt and to defraud the creditors. Mere constructive fraud is not generally sufficient; and by the term constructive fraud is meant an act which the law pronounces fraudulent because it tends to deceive or mislead and not because of any evil design on the doer's part. The debtor must have been actuated by a fraudulent purpose to justify attachment, proof of which must be presented.

13. Debtor contemplating fraudulent disposition of his property.—The writ is allowed whether the debtor has made the fraudulent disposition of his effects or is about to do so. The authorizations vary in the different jurisdictions, but that the debtor is about fraudulently to conceal, assign or otherwise dispose of his effects, so as to hinder or delay his creditors, is sufficient ground in almost every state. The fraudulent purpose may be shown by his declarations or its intent may be inferred from his acts and conduct. Preparation for the conveyance of real estate or the transfer of personal property as a gratuity or for a grossly inadequate consideration are always admitted as proof of the charge. But the acts from which the inference of intent to defraud creditors is sought to be drawn, must be of recent occurrence. Evidence that the debtor a few years before was embarrassed and put his property out of his hands to delay creditors is not admissible, al-

though he be now laboring under like embarrassment.³

14. Intended removal of property from the state.—It is sufficient ground for attachment that the debtor is about to depart from the state with the intention of having his goods removed from it, or that he, without the intention of departing himself, is about to have his effects removed from the state to the injury of his creditors; and in either case the writ is accorded regardless of any fraudulent purpose of the debtor. His good faith is not involved, but it has been held that where the purpose of removing the property is to raise money to pay debts it subjects the debtor to liability to have his property attached. The rights of the creditor are jeopardized when the debtor removes his property from the state without leaving enough to pay all of his creditors. The creditor cannot rely upon ordinary process in such a case, and that is the reason which lies at the foundation of the provision for attachment.

15. Fraud in contracting the debt.—Most of the states allow attachment not merely because the debtor has put himself without the reach of personal service, or because he has made or is about to make fraudulent disposition of his property, but also because of his fraud in contracting the debt. The debtor may be living permanently and openly within the state, with no thought of absconding or transferring his property or of removing it from the state,

³ Clark v. Smith, 7 B. Monroe 273 (Ky.); Askwith v. Allen, 33 Nebr. 418, 50 N. W. 267; Boyd v. Labranche, 35 La. Ann. 285; Lewis v. Kennedy, 3 Greene 57 (Iowa); Hardee Co. v. Langford, 6 Fla. 13.

yet if the debt upon which suit is brought was fraudulently contracted his property is subject to attachment. What constitutes sufficient fraud in such a case has been of no little embarrassment to the courts, and to obviate such embarrassment it has been provided in a few jurisdictions that the statements constituting the fraud must have been reduced to writing and signed by the debtor, or by someone acting for him.

This provision is based upon a theory entirely distinct from the others considered. Its purpose is to reach that class of cases in which a creditor has been deliberately injured by the willful falsehood of the debtor. One who, knowing that he is insolvent, makes a statement that he is solvent, and does so for the purpose of obtaining credit, fraudulently contracts a debt within the meaning of the statute. The presumption is that the debt was incurred with intent to defraud. Even if the debtor was solvent at the time, but made a false statement as to his financial condition, either as to property owned, or debts owed, and did so with intent to deceive and get credit, he comes within the provision. On the other hand, if a debtor, supposing himself to be solvent, in good faith makes statements to the effect that he is, when he really is not, his untrue statement would not in itself make him liable in attachment. The false statement need not be made directly to the creditor. If made to a commercial agency, for the purpose of obtaining a false rating, upon the faith of which rating a merchant is induced to sell on credit to the party making the statement, it comes within the stat-

ute. Likewise, does a false return as to solvency made by an officer of a corporation to the Secretary of State, from which a commercial agency has made a rating that is relied upon by one from whom the corporation seeks credit.⁴ In a few of the states the grounds of attachment extend beyond those mentioned, but they are exceptional and for that reason need not be considered.

⁴ *Emerson v. Detroit Steel & Spring Co.*, 100 Mich. 127, 58 N. W. 659; *Gries v. Blackman*, 30 Mo. App. 2.

CHAPTER II.

AFFIDAVIT—BOND—WRIT—CUSTODY OF ATTACHED PROPERTY.

16. **The affidavit.**—The proceeding may be initial, in which case it is termed “original attachment”; or it may be commenced in a suit already pending, at any time before final judgment, in which case it is termed “attachment in aid.” In all the states except Connecticut, Maine, Massachusetts, New Hampshire and Vermont, an affidavit must precede the issuing of the writ. It must be made by the plaintiff, his agent or attorney, and should set out the nature and amount of the indebtedness, with the grounds for attachment then existing. If the writ is applied for by a corporation the affidavit may be made by an officer of the corporation whose duty it is to learn of the facts alleged. As a general rule, it may be sworn to before any officer authorized to administer oaths; but it should be filed with the clerk of the court from which the writ is sought, and be made part of the record. It is the preliminary step to the lien and it is important that it be so marked by the clerk that it may be identified with the proceedings to follow. Mere neglect of the clerk to mark the affidavit “filed” will not invalidate the proceedings, however.

17. **Affidavit jurisdictional.**—The affidavit is necessary for jurisdiction, and if it does not follow the requirements of the statute the writ will be quashed

and the entire attachment proceedings dismissed.⁵ It is the foundation on which the proceedings rest, on which the court takes jurisdiction, and if the plaintiff neglect to lay it, every step afterwards taken, whether by court, clerk or sheriff, is void. Not only would a judgment or order for sale of the property be subject to reversal upon writ of error, but without a reversal, or any attempt to have the proceedings reviewed, a sale by the sheriff would give the purchaser no title. What is here said about the court's orders being void for want of jurisdiction is intended to apply to a case where there is no personal service or appearance on the part of the defendant, of course. By the service of summons or personal appearance the court obtains jurisdiction of the defendant and can proceed to judgment; and in such case the defendant might, by pleading to the attachment or by offering evidence against the ground urged by the plaintiff, debar himself, as well as his grantee, from afterwards urging that a sale of the attached property was void because no affidavit was filed.

18. **Contents of the affidavit.**—There are two distinct parts of the affidavit, one relating to the amount due from the defendant to the plaintiff, and the other as to the facts relied upon as ground for obtaining the writ. There are two principal reasons for requiring the amount of the indebtedness to be stated:

⁵ *Mobile Life Ins. Co. v. Teague*, 78 Ala. 147; *Thompson v. Robinson*, 34 Ark. 44; *Skinner v. Beshoar*, 2 Colo. 383; *Eads v. Pitkin*, 3 Greene 77 (Iowa); *Estlow v. Hanna*, 75 Mich. 219, 42 N. W. 812; *Powers v. Hurst*, 3 Blackf. 229 (Ind.); *Halley v. Jackson*, 48 Md. 254; *Wallis v. Wallace*, 6 How. 254 (Miss.); *Wando Phosphate Co. v. Rosenberg*, 31 S. C. 301, 9 S. E. 969; *Maples v. Tunis*, 11 Humphr. 108 (Tenn.); *Hudkins v. Haskins*, 22 W. Va. 645.

one is, that it may determine the size of the bond which the plaintiff must execute prior to the issuance of the writ, and the other is, that it may show whether the amount of indebtedness is equal to or above the minimum sum for which attachment is authorized under the statute. The averment as to indebtedness must be stated positively and not by way of inference; and, although the rule is different in a few of the states, it is quite generally held that a statement made upon information and belief is not sufficient.

19. **Same subject.**—In alleging the grounds of attachment, especially should the affidavit set forth the ultimate facts with certainty and particularity, for the court will not allow the attachment to stand if the evidence does not support the ground charged in the affidavit, even though it shows another existing ground. For instance, in a state authorizing, as distinct grounds of attachment, a fraudulent disposition of property by the debtor within two years, and an intended disposition of his property for the purpose of hindering and defrauding creditors, the plaintiff's judgment was set aside, where the sole ground set up in the affidavit was that "the defendant had within two years fraudulently assigned and transferred his effects with the purpose of hindering and delaying his creditors," the evidence being that the defendant was about to make such fraudulent transfer and was only prevented by the attaching officer taking charge of the property. While statement of one statutory ground is sufficient to procure the issuance of the writ, the affiant may state as many coexisting grounds as he likes. If any

one of them be shown to be true it will sustain the writ. If the debt is a joint one against two or more debtors and one ground of attachment exists against one and another and different ground exists against the other or others, the affiant may set up in one affidavit the grounds against each debtor as it exists. Defective affidavits may be cured by amendment, and others may be amended by including grounds not originally set up; but as affidavits, bonds, writs, returns, etc., are usually made only upon order of the court the question of amending them will be deferred until it is considered herein under the head of Proceedings in Court.

20. **Bond.**—The remedy of attachment being extraordinary and often drastic in its nature, it would seem unjust to the debtor were he not protected lest it be wrongfully used against him. Therefore, in most of the states, it is required that the plaintiff before obtaining an attachment shall execute a bond, with security, for the indemnification of the defendant against damage by reason of the wrongful suing out of the writ. The terms of such instruments vary, but that is the usual scope of them. Great strictness has been manifested on this point, and a failure to give bond is fatal to the suit, unless the statute authorizes the defect to be cured. The sufficiency of the bond may be questioned, either as to its terms, parties, or amount, and if not such as the statute requires it will be treated as no bond at all, subject, of course, to any authorized amendment. In some states the statute not only prescribes the conditions and regulates the penalty, but gives the form of the bond. Where that is

the case the form must be followed. Whether there be a prescribed form or not the conditions generally are that the plaintiff must prosecute his action without delay and pay any judgment that may be awarded against him for costs, and damages for wrongfully suing out the attachment. The duty of accepting and approving the bond usually rests with the clerk or officer issuing the writ, and unless the statute requires him to endorse his approval the act of accepting it and issuing the writ will be treated as an approval.

21. **The obligee.**—While the usual requirement of the statute is that the defendant in the suit be made the obligee in the bond it should be understood that this means the defendant against whom the attachment writ is to issue. If A should bring suit against B and C on some joint obligation, and, there being a cause for attachment against B that did not exist against C, A should desire to attach the property of B, then B alone should be made the obligee. Should A fail in his suit and an action afterwards be brought to recover for a broken condition it would be brought in the name of B. Some statutes require the bond to run to the state. Where that is the case and it is desired to bring suit upon it to recover damages for a broken condition, the action would be in the name of the state for the use of the party whose property had been wrongfully attached. Likewise where an attachment is sued out against all of several defendants and the property of only one is attached, a suit upon the bond, although brought in the name of all the obligees, would

be for the use of the defendant having his property attached.

22. **Execution of the bond.**—The plaintiff is usually required to sign the bond, but that often might be impracticable. His agent or attorney might learn of an intended removal of the debtor's property from the state at a time when ready communication with the creditor is impossible. In such cases it is generally provided that the agent or attorney may execute the bond for the creditor. This may be done without power of attorney, but in such case, the agent so signing becomes the principal obligor. Where the agent has power of attorney to sign and does sign as attorney of fact for the creditor, then the creditor becomes the principal obligor. But if an attorney-at-law has not the specific power to sign the creditor's name, although he may have general authority to collect for the creditor and transact business for him, a bond so signed would not be binding upon the creditor in the absence of ratification. The court might accept the bond on the presumption that the attorney had the authority to sign his client's name, but in the case of suit on the bond the client could successfully defend upon the ground that the attorney did not have the authority. However, that would not render the bond void. It would be a subsisting obligation of the attorney and the sureties.

23. **Surety.**—The surety must sign with the principal and that act obligates him to pay if the principal does not. He must be a resident of the state and in solvent circumstances. If he be a member of a partnership firm he cannot bind the firm un-

less specifically authorized to do so; but his act in signing the firm name without such authority will bind him personally. Solvency, residence in the state and ability to contract, etc., are presumed, but the presumption may be overcome by the defendant showing the contrary. If during the pendency of the suit it is made to appear that the bond is insufficient because the surety at the time of signing was not solvent, or because he has become insolvent since signing, the plaintiff may be required to furnish another and a solvent surety. Clearly the defendant has the right to have a good bond for his indemnity at all times during the pendency of the proceedings. In such case the added surety would become liable for a breach of condition to the extent of an original surety.

24. **Nature of the writ.**—The preliminary affidavit and bond having been executed, the next step is the issuing of the writ which authorizes the officer to whom it is directed to levy upon and hold so much of the debtor's property as will be sufficient to satisfy the creditor's claim.

Where the proceeding is initial and not in aid, the writ performs the dual function of a personal summons and an execution. It performs the function of a summons in that it commands the appearance of the defendant to answer the plaintiff's complaint, and of an execution in so far as it authorizes the seizing of the defendant's property. Ordinarily no judicial deliberation is called into operation, and the act of issuing the writ is performed by the clerk of the court upon the plaintiff's complying with the provi-

sions of the statute as to affidavit and bond. The act is, therefore, a ministerial, rather than a judicial one. As the clerk is but the agent of the court or judge he is supposed to act under the authority of the court and the supervision of the judge, however. Although in its strict sense not a judicial act, the issuing of the writ is a step in the direction of exercising the powers of the court and for that reason should be subject to regulation by the court within such limitation as is fixed by statute.

25. Duty of the officer receiving.—It is the duty of the officer on a writ coming to his hands to execute it at once, and if delay on his part in that regard results in loss to the plaintiff he is answerable for such loss. If it be in legal form and issued out of a court of competent jurisdiction it will be a complete justification to the officer for attaching, and no obligation rests upon him to investigate whether the preliminary steps have been pursued. The plaintiff's claim may not be a just one; though just it may not be collectible through process of attachment; though just and collectible through attachment the ground for seizure charged in the affidavit may not be sustained by the facts; yet will the writ, if issued in conformity with the statute, be a complete shield to the officer so long as he does his duty under its mandate. Under it he is authorized to levy upon the defendant's personal property and real property. While he is authorized to levy upon property sufficient in amount to satisfy the claim set up in the affidavit and pay costs, he may not seize upon and withhold from the possession of the defendant property

grossly in excess of what is necessary for that purpose, unless, of course, the property is of an indivisible nature.

26. **Same subject.**—To guard against excessive levies it is provided in some states that the officer shall have the property appraised by disinterested freeholders and such appraisement returned into court with the writ. If the levy is made upon real estate the officer is not required to take possession, but for the purpose of preserving evidence of the levy and of affording notice to purchasers and others that the land is incumbered, he is required to file with the recorder of deeds a certificate of his levy. In all cases where the officer is required by statute to have personal property valued by appraisement or to have recorded a certificate of his levy upon real estate he should closely follow the statute. Otherwise, the lien of the attachment might be lost and he become liable to the creditor.

27. **Return of writ.**—After being executed the writ is returned to the court from whence it issued, with an indorsement thereon, setting forth the manner of its execution. It is open to attack (usually by motion to quash) for any substantial defect appearing in the affidavit, the bond or the writ itself. The quashing of the writ effectuates the release of the property, of course, and destroys all lien or privilege which might inure to the plaintiff by virtue of the levy. It should be observed, however, that the liberal statute of amendments and jeofails, in force generally in the states, permits amendments to affidavits, bonds and writs in all matters of form and in most

of the states amendments as to substance, and in that way a release of the property may be avoided. If the return of the officer shows that the writ has been improperly served, the service may be quashed also.

28. **Attaching officer's possession.**—Where the subject of the attachment is real estate the question of custody does not arise, for the reason that the possession of the debtor or anyone claiming under him is not disturbed. But in the attachment of chattels, the purpose of the writ being to hold the property of the defendant until, under final process in the cause, it can be made available to satisfy the plaintiff's demand, it is highly important that the officer should sustain such relation to the property he has seized as will enable him to produce it when final process shall be awarded. His care of it is important, too, in view of the fact that he must return it to the defendant unimpaired in the event of the cause being decided adversely to the plaintiff. To that end he is, by the levy of the writ upon personal property and its reduction into his possession, vested with a special property in it, which enables him to protect his possession. In order to maintain it, however, and to entitle him to the continued protection of the law, he must comply with the requirements of the statute, or show legal excuse for not doing so; and if he does not, he becomes liable, not only to the attaching creditor, but to the owner of the property and those claiming under him.

29. **Pursuit of removed property.**—If the attached property be removed, without his consent, the officer may pursue and reclaim it, even though it be

removed to another county, and all instruments of the law available to his reclaiming it he may command. In fact it is his duty so to pursue it and his failure therein will make him liable for all resultant loss. For instance, where in an action against an officer for such a failure, the property consisted of a quantity of sawlogs, he offered to prove that the logs were afloat in a boom on their way down the stream, and that the current of the water was so great that he could not with any force at his command stop the logs and prevent them going into another county and into the possession of other parties, it was held that the evidence was properly rejected, the facts, if true, constituting no defense.⁶

30. **Preservation against loss.**—Not only must the officer keep the property in his possession and control but he should take reasonable precaution against loss by fire, flood, theft or otherwise. It is his imperative duty so to preserve it that it may be subject to the final order of the court in as unimpaired condition as possible. That duty continues with him, even after the expiration of his official term, unless the statutes of his state provide some means by which he may transfer his special right in the property and shift his responsibility to his successor.

If the property consists of horses, cattle or other livestock he must make provision for its sustenance; or if it be property requiring extraordinary care for its safety he must exercise such care.

31. **Sale of perishable property.**—If the attached property be of a perishable nature and in immediate

⁶ Lovejoy v. Hutchins, 23 Maine 272.

danger of waste or decay many of the statutes provide for its sale, like sale on execution, and the proceeds held to abide the final judgment in the suit. The methods of determining whether the property is of a perishable nature and of conducting the sale vary in the different states, but the courts are quite strict in requiring the officer to follow the steps marked out by the statutes.

In a few of the states, sale of the property not actually perishable but of such character that the keeping of it will necessarily be attended with such expense as greatly to depreciate the amount of the proceeds to be realized therefor, may be had after appraisement as in the case of perishable property. The object of sale is to change the form of the property for the benefit of both creditor and debtor. Either may ask for the sale, and neither can prevent it, if the conditions are such as to bring the property within the provisions of the statute. The title which the purchaser gets at such a sale is good as against the world. Even if it should turn out afterwards that the property did not belong to the defendant or that there was a valid and subsisting lien upon it, the purchaser's title would stand. The claim of the true owner or lienor would follow the proceeds, however, and be satisfied from them.⁷

32. Forthcoming bond.—In some of the states the defendant or person in whose possession the property may be found is allowed to retain possession of it on entering into a bond with security, with condi-

⁷ *Young v. Kellar*, 94 Mo. 581, 7 S. W. 293; *Betterton v. Eppstein*, 78 Tex. 443, 14 S. W. 861.

tion that the property will be forthcoming to abide the judgment of the court in the suit. The effect of giving such a bond, usually termed a “forthcoming bond,” is not to discharge the lien of the attachment. Its object is simply to secure the safe keeping and return of the property if its return should be required, and for that reason it is not subject to a subsequent attachment, or a junior execution. If an officer in A’s suit by attachment against B should seize property and B should desire to retain the present possession he would be permitted to do so by entering into a bond to the officer, with condition that the property shall be forthcoming to answer the judgment of the court in the pending suit. The bond would be discharged by a return of the property or by failure of the plaintiff to establish his ground of attachment.

33. **Dissolution bond.**—There is another kind of bond available to the defendant, called “bail bond” or “dissolution bond.” Its effect is to dissolve the attachment and entirely release the property. It may be given at any time before final judgment by a defendant desiring a return of the attached property. Its condition is that the defendant or his sureties will pay whatever judgment may be recovered against him in the suit. Such a bond obliges the payment of the judgment by the defendant or his sureties though the attachment was wrongfully issued. In other words, on the execution and approval of the dissolution bond the suit will be conducted as an ordinary action against the defendant personally and judgment necessarily rendered without recognition

of the lien and without reference to the attached property, although the defendant may, for the purpose of relieving himself from payment of costs attending the attachment, deny the allegations of the affidavit on which the attachment issued. If the defendant is successful in the trial of the issue raised by his denial of the affidavit, judgment would go against the plaintiff for all court costs incident to the attachment and such expense as was necessarily incurred by the officer in caring for the attached property.

CHAPTER III.

NOTICE TO THE DEFENDANT AND PROCEEDINGS IN COURT—SALE OF PROPERTY AND DISPOSITION OF PROCEEDS.

34. **Personal service.**—Where there is personal service upon the defendant the suit will be in personam (against the person) as well as in rem (against the thing); if judgment be rendered in favor of plaintiff it will be a general one against defendant, and, if plaintiff succeed in his attachment, special against the property levied upon. In such case the court has jurisdiction over the person as well as the property. And it may be noted here that it is not always necessary to the court taking jurisdiction of the defendant that the writ be read to him or that a copy of it be delivered to him in person. Most of the states make the delivery of a copy of the summons at the domicile of the defendant with an inmate of competent age to receive it, as good in law as an actual service of it upon the defendant. A party served that way can disregard it only at his peril. In those states, at least, the leaving of a copy of the attachment writ at his usual place of abode with a member of the family of competent age will constitute personal service.

35. **Service by publication.**—But where personal service is not had upon the defendant, as where he is a non-resident, an absconding debtor, or one who

stands in defiance of an officer so that personal service cannot be had upon him, then the proceeding is in rem. In such cases there is provision in all the states for another kind of notice than by summons, called "service by publication." Service by publication is effected ordinarily by publishing in a local newspaper of general circulation and by posting notices in conspicuous places in the locality where the proceedings in attachment are pending. Such service was unknown to the common law, and has never been regarded as sufficient to justify the court in rendering judgment or order requiring the defendant to do anything. While spoken of frequently as "constructive service," that use of the term has been justly criticized. It is really nothing more than information, given in a public way to a defendant who is beyond territorial jurisdiction, or secreted within it so as not to be personally found, of notice of the pendency of a suit against him. Not only must the notice be published as often as is required, but to comply with the spirit of the law, those who have the direction of the publication should select the most widely read newspaper or the one most likely to reach the defendant. Some of the statutes wisely provide that the officer charged with the duty of making the publication shall mail a copy to the defendant at his last known address.

36. Preserving proof of service by publication.—The various steps required by the statute to accomplish service by publication must be strictly followed and evidence of them preserved in the record. Where there is a provision specifying what form the evi-

dence must have, such evidence must be precisely what the statute prescribes. Notice to the absent defendant, like notice in any other prescribed form, and like any other jurisdictional matter, must appear of record. Failure of the record to show the fact of publication of notice in compliance with the law is so serious that judgment in favor of an attaching creditor may be reversed on error. Although differing from summons in not authorizing the court to render a personal judgment, publication notice does not differ from it so far as concerns the preservation of evidence. Every reason against omitting the summons from the record, where the defendant makes no appearance so as to cure defect in the summons, applies against the omission of publication notice when it is relied upon to show jurisdiction completed over the attached property. If pending the proceeding it be discovered that proofs of notice by publication are defective, proof of correct service may be supplied. Courts are quite liberal in allowing reports of notice proofs to be corrected so as to conform to the facts. The court should approve the service. If the service is so substantially defective that judgment rendered under it would be void, the attachment does not necessarily abate, but upon motion of the plaintiff the cause will be continued to some subsequent term or time to enable proper service to be made, and in the meantime the attached property will continue in the possession of the officer who made the levy.

37. **Effect of service by publication.**—Publication notice does not give the court jurisdiction. The

actual attachment of property must concur to effectuate that. Not only is this so, but there must also be continuous holding of the attached property. It follows, therefore, that if the sheriff should release the levy, or the property be destroyed by fire or otherwise, in the absence of appearance by the defendant, the court loses all authority to adjudicate the claim, no matter how perfect the record relating to publication. As to the effect of this kind of service, the courts have not been entirely harmonious. The want of harmony arises not so much from difference in statutes under which the cases have been decided as from efforts to reconcile the arbitrary provisions of this method of obtaining service. Keeping prominently in view the sacredness of personal rights, some of the courts hold that publication of notice is intended to obtain jurisdiction of the person, although they concede that no jurisdiction of the person is thereby obtained for any other purpose than to make the attached property subject to sale in payment of the debt sued on. They accordingly hold that where there has been no publication, or publication which is fatally defective, the proceedings are void. On the other hand, a few of the courts take the view that the essentials of jurisdiction are acquired by seizure of the property under the writ and that the omission of publication is a mere irregularity. The better view, however, is that the publication is a substitute for summons, and however inadequate it may be in the direction of giving notice to the defendant, it is nevertheless a right that should not be ignored—that a judgment rendered without it is void, and that no

title to property sold thereunder is acquired by the purchaser.⁸

38. **The pleadings.**—In states where the rules of common law pleading obtain, the plaintiff must present to the court his cause of action by declaration, and in those states which have abolished common law pleading, the plaintiff must present his cause of action by petition, complaint, or by such other instrument as the code provides for the plaintiff in an ordinary action. A failure to do so in the manner and within the time prescribed by statute or rules of court may result in an abatement of the suit and a release of the attached property. In other words, in addition to affidavit, bond, writ, levy of the writ, and service of summons or notice by publication, there must be some pleading in which the plaintiff's cause of action is set out. Of course, this is meant to apply only to courts of record where written pleadings are required and not to courts conducted by justices of the peace and other inferior courts where written pleadings are not required.

39. **The defendant not appearing.**—If the defendant does not appear and enter some character of defense, the court will hear evidence as to the claim of indebtedness and the ground of attachment set up in the affidavit, and render judgment accordingly. If the defendant has been personally served with process and the court finds from the evidence a just claim of indebtedness and that the ground of attach-

⁸ *Millar v. Babcock*, 29 Mich. 526; *McMinn v. Whelan*, 27 Calif. 300; *Clark v. Bryan*, 16 Md. 171; *Haywood v. Collins*, 60 Ill. 328; *Firebaugh v. Hall*, 63 Ill. 81.

ment set up in the affidavit exists, the judgment will be a general one against the defendant and a special one against the property attached.

If there has not been personal service, and the only notice has been by publication, the judgment will be special only against the property. In such a case there must be proof both of indebtedness and of the ground of attachment alleged. Lack of proof in either one will be fatal to judgment, no matter how abundant it may be in the other. To illustrate, a creditor having fulfilled against an alleged non-resident debtor all the statutory requirements as to affidavit, bond, writ, and service by publication, and with such levy upon the property as to give the court jurisdiction, may prove a cause of action, certain in character and amount, yet will he fail to recover judgment if his proofs as to the debtor's residence be by the court deemed insufficient.

40. **Defendant appearing and defending.**—If the defendant appears he may institute two lines of defense, one as to the attachment and not as to the indebtedness; or he may defend as to the indebtedness alone. If he succeeds in his defense as to the indebtedness, judgment will go against the plaintiff as to the entire proceeding, the property levied upon will be released from attachment, and plaintiff and his sureties on the attachment bond will become liable to the defendant for all damages sustained by him for the wrongful suing out of the attachment. That would be the result whether he plead to the attachment or not. The issue evolved as to the cause of action is entirely distinct from the issue raised in the

attachment. The pleadings to produce it are conducted as if no attachment had been sued out.

41. **Same subject.**—The issue on the attachment is raised by pleading to the affidavit. The plea or answer is by way of traverse to the facts set up in the affidavit constituting the ground for attachment, and is required to be on oath. It is usually spoken of as a plea in abatement, and in most states is heard before a trial of the issue involved in the claim of indebtedness. It is not a plea in abatement as understood at common law, however. At common law the filing of a plea in bar before a plea in abatement was disposed of was a waiver of the plea in abatement. In some of the states the two issues may be pending at the same time and may be tried at the same time; and it would seem to be more convenient and more expeditious, where the defendant has pleaded to the affidavit and to the declaration also, to have the two issues tried at one and the same time. In such case there are two distinct findings, one as to the indebtedness and the other as to the alleged cause for attachment.

42. **Third party interpleading.**—It sometimes occurs that a person not a defendant claims the property attached. In most of the states, such a person, instead of being compelled to resort to replevin to assert his claim, may interplead in the attachment proceedings, verifying his plea by affidavit, without giving bond. The property is not thereby released from the levy, but continues in the custody of the officer. On the filing of the interplea it becomes the duty of the court through trial by jury, or such other

mode as the statute may prescribe, to determine the right of the claimant to the property. If found to be in the claimant, it will be released and judgment rendered in his favor for the property and all costs necessarily expended by him. If the claimant recovers all the attached property it has the effect to end the attachment proceedings, but suit may continue for the purpose of determining the question of indebtedness between the plaintiff and the defendant, provided the defendant has been served with summons or appears. In the absence of such service or appearance, however, the effect would be to end the entire cause. For example, in A's suit against B, a non-resident debtor, the only service is by publication. The property levied upon as the property of B is claimed by C, who by interplea establishes his right and obtains possession of it on the order of the court. B not appearing, personal judgment cannot be rendered against him, and as all the property seized upon the attachment has been released, the court is without jurisdiction to proceed.

43. **The amendments.**—The general trend toward liberal amendment in court proceedings, which has been so manifest in late years, has extended to proceedings in attachment. It has included amendments of substance, as well as of form, and, in many of the states, it is provided that no writ of attachment shall be quashed, nor the property taken thereon restored, on account of the insufficiency of the affidavit, writ of attachment, or attachment bond, if the plaintiff shall cause a legal and sufficient affidavit or bond to be filed, or the writ amended in such manner as the court

shall direct. In other states where less liberality obtains, amendments are allowed only to cure defects of form. Mere clerical mistakes, such as a failure to insert the day of the month or the omission of a word easily supplied in making sense of the context, are readily corrected on leave, independent of any express authorization appearing in the attachment act; but defects of substance are incurable except where the right to amend has been expressly extended by statute to matters of substance or where it is held, as in some states, that the statutory provision allowing amendments generally in matters of procedure applies.

44. **Amendment of affidavit.**—Defects in the affidavit are of two kinds: those which affect the jurisdiction and those which do not. Where the statute requires the plaintiff, in addition to stating the nature and amount of indebtedness, to set forth some one of the statutory grounds for attachment and the affidavit does not do so, the defect is jurisdictional, and in the absence of personal service upon the defendant, the court has no authority to render any character of judgment. An affidavit setting up none of the statutory grounds for an attachment is a nullity, and the court, not having acquired jurisdiction, cannot make an order to amend. Where the affidavit does set forth a statutory cause, however, the court may allow an amendment to the extent of changing to another cause or of correcting a defective statement of the one set up. Rights acquired by third parties after the issuance of a writ upon a defective affidavit are unaffected by the amendment, however.

45. **Amendment of bond.**—A bond may be insufficient because of a defect appearing upon its face or because the sureties are insolvent. Objection is usually raised to it on a motion of the defendant to quash the writ. The purpose of the law requiring the bond is to indemnify the defendant against a wrongful use of the writ, and if it be insufficient to fulfill that purpose, the writ should be abated. But if the plaintiff has in good faith undertaken to comply with the statute, it would be unjust to deny him an opportunity so to correct the bond as to make it a sufficient indemnity. Accordingly, when a motion to quash the writ is based upon a defective bond, the court will allow a cross motion to amend the bond or supply a new one, and if the correction shall be made in such time and manner as the court may direct the motion to quash will be overruled. If the bond be amended the amendment must be with the consent of the sureties, of course.

46. **Amendment of writ.**—As in the case of a defective affidavit, amendments of the writ are more freely allowed before levy than afterwards. There is no reason why the court may not before service allow any kind of an amendment. Nobody is in court but the plaintiff, no property has been attached, and the rights of no one can be prejudiced by it. But after levy the defendant has an interest to oppose the bettering of a bad writ, and the court should not allow any substantial amendment without giving him an opportunity to be heard. Even if he appears and consents, the amendment will not retroactively make the writ good as against other attachments of the

same property.⁹ Such formal defects as the omission of the seal of the court, the filling-in of the wrong date, and the like, are amendable at any time while the proceedings are pending.

What has been said in relation to amending the writ applies to applications for amending the return of the officer who served it. The return is a report which apprises the court and the parties litigant of what the officer has done in the way of executing the command of the writ, and if it does not recite the truth it should be amended in such a way that it does.

47. **Amendments generally.**—Other amendments than those involving the affidavit, the bond, or the writ, such as applications to amend certificates of publication, reports of appraisement of perishable property, or orders spread of record by the clerk, are always proper matters for judicial consideration, and it is a universal rule in attachment, as well as in other proceedings, that the court will lend a ready hand toward having its records recite the truth. It should be observed, however, that there is a great difference in the length to which a court will go in matter of amendment in a case where proceedings are pending and undetermined and in a case that has been concluded. So long as the case is on the docket as an undetermined controversy, the court has complete control of its proceedings and may correct defects and mistakes without impairing the rights of anyone. But when the controversy is closed by final judgment and the cause is off the docket, the court

⁹ Putnam v. Hall, 3 Pick. 445 (Mass.).

will hesitate to make any change or correction even upon notice, and will not do so if it tends to impair the rights of innocent purchasers or other creditors.

48. Grounds for dissolution of attachment.—

As already suggested, a finding in favor of the defendant on the question of indebtedness works a dissolution of the attachment. So likewise does a finding in his favor on the issue raised by his denial of the ground for attachment set up in the affidavit, although the issue as to indebtedness may be decided against him. In either case the dissolution is accomplished through a trial of the merits. But it may be, and often is brought about through defects in the plaintiff's proceedings without test on the merits. Such defects are usually found in the two preliminaries to granting the writ, the affidavit and the bond, and the dissolution is procured upon motion based upon the defects. For instance, if the affidavit fails to allege, as required by statute, the nature and amount of the indebtedness, the defendant may move to dissolve the attachment, and if the affidavit is not amended within the time fixed by the court, the motion will be sustained. Again, if the bond be insufficient either because of defect appearing upon the face of it or because of insolvency of the surety, the defendant may move to dissolve the attachment, and if the plaintiff shall fail within such time as the court may fix to file a sufficient bond, the motion will be sustained.

49. Same subject.—In all the states there is allowed to debtors property to a certain extent free and exempt from execution and forced sale. Where

n attachment has been levied upon property so exempt, the defendant may secure its release on motion and satisfactory proof in support of it, irrespective of the question of indebtedness or the ground of attachment alleged.

A dissolution may be had because of failure of the plaintiff to file a declaration or petition setting forth his claim of indebtedness within the time required by the statute or rule of court. Substantial defects appearing on the face of the writ, if not cured by amendment, are sufficient grounds for dissolving the attachment. If the return shows that the levy was made by an officer not authorized by law or at a time not authorized by law, it may form the basis of a motion to dissolve. It should be observed, however, that defects which appear upon the face of the affidavit, the bond, the writ, or the return, excepting those which are jurisdictional, should be questioned at the earliest stages of the controversy, otherwise the defendant may be held to have waived them.

50. **Same subject.**—Upon the theory of the National Bankruptcy Act that the debtor's property is in the custody of the law for the pro rata satisfaction of the claims of his creditors, no lien of attachment can be acquired upon the property of one adjudged a bankrupt, and where his property is levied upon by virtue of an attachment sued out by one of his creditors, the attachment will be dissolved upon motion of the defendant or the trustee in bankruptcy.

As to the effect which the death of the defendant will have upon the matter of dissolving the attachment, the laws of the states are not uniform. In

some, his death pending the proceedings and before judgment dissolves the attachment lien in toto, while in others it continues as against his representative, provided the action be based on a claim that is collectible from his estate. Where the latter rule prevails, the administrator or representative is usually substituted as defendant.

In a few of the states the course of the proceeding is but little disturbed by the death of the defendant. In Wisconsin, for instance, if property shall be under levy of the writ and the defendant die pending the action or after judgment, execution may issue and satisfaction out of the attached property be obtained in the same manner as if the defendant were living.¹⁰ Such statutes are exceptional, however.

51. Dissolution as to others than the defendant.—It is the duty of an officer attaching personal property to reduce the same to actual and visible possession so far as, under the circumstances, can be done, and continue such possession up to the time it shall be offered for sale upon the order of the court. If he do not he will be regarded as having abandoned his attachment, and his lien as to subsequent attachers, or purchasers in good faith from the defendant, will be lost.¹¹

Where an officer suffered certain goods he had attached to be mixed with others of a like kind which had been attached by another officer who then returned an attachment of the whole by himself, it was

¹⁰ Wisconsin Statutes (Brossard's Revision of 1949), § 266.25.

¹¹ See *Nichols v. Patten*, 18 Me. 231; *Waterhouse v. Smith*, 22 Me. 337; *Baldwin v. Jackson*, 12 Mass. 131; *Sanderson v. Edwards*, 16 Pick. 144 (Mass.).

held that the officer who permitted the goods he had levied upon to be mixed with the others had lost his special property in them and that the other officer was entitled to hold them.

It is often necessary for the officer to place the attached property in the hands of another as custodian. In such a case the lien is not lost, because the possession of the other is regarded as the officer's possession. But if the custodian abandon the property or allow it to come into the possession of an adverse claimant, or be attached by another officer, the lien of the first attachment will be lost.

52. The effect of dissolving the attachment.—An order of the court dissolving the attachment has the effect to free the property from the lien, and it is the duty of the officer to turn it over to the defendant, or to the one adjudged to be entitled to its possession, unless the judgment of dissolution be suspended by an appeal or writ of error.

If there has been personal service upon the defendant, or a voluntary appearance by him, the suit may proceed for the purpose of determining the matter of indebtedness. The dissolution merely defeats that particular writ and does not touch the merits of the main action or dismiss the cause. But if the service be by publication only, then, in the absence of a voluntary appearance by the defendant, the effect of the dissolution will be to dismiss the cause, because without the levy and custody of the property the court is without jurisdiction.

There may be dissolution as to part of the property and a continuance of the lien as to the rest. In such

a case, of course, the suit would proceed as to the unreleased part.

53. Sale of attached property after judgment.—

We have already seen that where the property is of such perishable nature or of such character that the keeping of it will involve great expense, it may be sold and the proceeds held to await the final judgment of the court. Ordinarily, however, there can be no sale until the rights of the parties have been determined by judgment. If the defendant has been served with summons or voluntarily appears, the plaintiff on establishing his claim is entitled to a personal judgment against the defendant—a judgment which may be satisfied by an execution against any of the defendant's property. In a few of the states, a personal judgment has the effect to dissolve the attachment and release the property, so that it may become subject to general execution. But in the most of them it has no such effect; the lien of the attachment continues; the property is sold upon special execution and the proceeds applied to the discharge of the plaintiff's judgment. If the property be of a divisible nature, only such will be sold as will be sufficient to satisfy the plaintiff's judgment, and the officer will release the remainder to the defendant or to the person entitled to its possession.

54. Duty of officer as to sale.—As soon as judgment is rendered in his favor and an order for sale is entered the plaintiff has the right to have the property sold on execution and the proceeds applied to the satisfaction of his judgment. He may sue out the special execution at once and apply to the officer to

advertise and sell the attached property, and a failure to do so will make the officer and his bondsmen liable to the extent of the judgment when the same is less than the value of the property and to the extent of the value of the property if it be less than the amount of the judgment.¹²

Furthermore, the officer is liable to be fined for contempt of court for failing to perform his duty in that regard.

Having made the sale, it is the duty of the officer to apply the proceeds in satisfaction of the plaintiff's judgment and in such further way as the statute or the order of the court may direct. His failure to account for and so distribute the proceeds renders the officer liable to the attaching creditor and also to the defendant for the surplus, if any, above an amount sufficient to satisfy the judgment, or to any other person entitled to such surplus.

¹² See *Weaver v. Wood*, 49 Cal. 297; *Whitney v. Farrar*, 51 Me. 418; *Blake v. Kimball*, 106 Mass. 115; *Trowbridge v. Bullard*, 81 Mich. 451, 45 N. W. 1012; *Wheeler v. McDill*, 51 Wis. 356, 8 N. W. 169.

GARNISHMENT

CHAPTER IV.

NATURE OF THE REMEDY.

55. **Definition.**—Garnishment is a proceeding by which a party indebted to the defendant in an action or having in his possession effects of the defendant may be summoned into court and compelled to disclose the amount and nature of the indebtedness or effects, so that the same may be subjected to the payment of the plaintiff's claim. The person so summoned is called a garnishee. Regarding it in the light of an equitable proceeding to determine the ownership of a fund and make it available to discharge a debt of the original owner, it has in some of the Eastern states been denominated trustee process, and the person summoned is called trustee.

56. **Nature of the remedy.**—Although derived from a custom which at an early date obtained among merchants in London, it is not a common law remedy and would not exist in this country except for statute. While it is designed to accomplish the same purposes as an attachment, or execution, it is unlike either of those writs in that it does not authorize a levy upon property. In that it compels the garnishee to disclose under oath whether he is indebted

the defendant or holds any of his effects the process partakes somewhat of the nature of a subpoena, and, as it warns him against paying the defendant what he may owe him or of disposing of the defendant's property that he may have, it partakes of the nature of an injunction.

Although it is a judicial proceeding against the garnishee which may result in a judgment against him it is not an independent suit. It is merely an auxiliary remedy open to a plaintiff to reach the property and credits of his debtor defendant when attachment and execution are unavailing. In that sense the law regards the garnishee as a mere stakeholder of the fund or property sought to be reached.

57. Two kinds of garnishment.—There are two kinds of garnishment, one available to the plaintiff before the recovery of judgment against the defendant, usually called garnishment in aid of attachment, and the other where the plaintiff has already recovered judgment, but is unable to obtain satisfaction by ordinary execution, usually called garnishment in aid of execution. An example of the former is where A at the time of suing out an attachment writ or summons against B, his debtor, makes affidavit that he believes some person, naming him, is indebted to or holds property belonging to B; whereupon the person named is summoned and compelled to answer relative thereto. An example of the other kind is where A, having recovered judgment against B, but unable to find property of B out of which to satisfy it by execution, makes affidavit that some person, naming him, is indebted to or holds property belong-

ing to B, whereupon the person named is summoned and compelled to answer.

58. **Distinction between the two kinds.**—Where one is summoned as garnishee while the suit is pending between the plaintiff and the defendant, and his answer shows that he is indebted to the defendant, judgment against him will be suspended until a determination of the main suit, and if it shall be decided against the plaintiff, the garnishee will be discharged; whereas, in case of garnishment in aid of execution, judgment will be rendered against the garnishee at once, as soon as it appears that he is indebted to the defendant. Again, in garnishment before judgment, the garnishee will be discharged notwithstanding his indebtedness to the defendant, and the subsequent recovery of a personal judgment in favor of the plaintiff against the defendant, if at the time there does not exist some statutory ground of attachment against the defendant; whereas, in garnishment after judgment the garnishee indebted to the defendant will be held, regardless of an existing ground of attachment.

59. **Persons subject to garnishment.**—The proceedings may be maintained against private corporations as well as individuals. Upon grounds of public policy they may not, in the absence of express statutory authority, be maintained against municipal corporations, such as counties, cities, townships, and school districts. For the same reason a municipal officer or agent is not subject to the process where he holds funds or property of the corporation in his official capacity. The interests of the public are

paramount to those of the individual and the time and attention of its officers should not be taken in proceeding for the collection of a debt in which the public is in no wise interested.

As a general rule, administrators and executors are exempt from the proceeding, although they may be held for distributive shares due heirs and legatees, after order of distribution has been entered in the court where the estate is being administered. In states where a married woman is by statute authorized to contract in her individual right and name she may be sued and held as garnishee.

Likewise, officers and agents of the government of the United States, the government of the individual states, and their officers and agents holding public funds or property are exempt from the process.

60. Right of action by defendant against garnishee essential.—In order that plaintiff may maintain his proceeding against the garnishee there must be a subsisting right of action at law in the defendant against the garnishee.¹³ In other words, as the plaintiff seeks to avail himself of the rights of the defendant against the garnishee, his recourse against the latter must of necessity be limited by the extent of the garnishee's liability to the defendant. This principle is subject, of course, to exception where the garnishee is in possession of effects of the defendant under a fraudulent transfer from the latter. There, though the defendant would have no claim against

¹³ *Jefferson County Savings Bank v. Nathan*, 138 Ala. 342, 35 So. Rep. 55; *Earley v. Redwood City*, 57 Cal. 193; *Richardson v. Lester*, 83 Ill. 55; *Farwell v. Chambers Circuit Judge*, 62 Mich. 316, 28 N. W. 859; *McPherson v. Atlantic & P. R. Co.*, 66 Mo. 103.

the garnishee which a court would enforce a creditor of the defendant may subject the effects in the garnishee's hands to the payment of his claim.

61. **Garnishee's liability for property.**—The garnishee's liability may be considered under two heads: first, his liability in respect to property of the defendant in his possession; and second, his liability as a debtor of the defendant.

Under the first head may be considered what character of property belonging to the defendant, in the garnishee's possession, will make the garnishee liable. It is universally held that a debtor's interest in real estate cannot be reached by garnishment served upon the holder of the legal title; and of personal property it may be said that it must be such as is capable of being seized and sold on execution. For example, where a garnishee admitted that he had in his possession, when summoned, a horse of the defendant, but showed that the horse was by law exempt from execution against the defendant, he was held not to be chargeable. So one having in his possession a promissory note belonging to the defendant cannot in respect thereof be charged as garnishee. The maker of the note, if it is due, is the proper garnishee.

As a general rule, the property must be in the actual possession of the garnishee or within his control. Though not in his actual possession, if he have the right and the power to take immediate possession, he will be regarded as in possession. For example, if an agent of the garnishee should take possession of property belonging to the defendant pursuant to an agreement that the garnishee should hold

possession, the latter would be liable though the property had never been in his actual possession.

The possession of the garnishee must be of such character as to give the defendant the right to recover as owner. There must be a contract, express or implied, coupled with interest in the defendant whereby he has the right to recover the property for his own use.

A, receiving money from B, for the express purpose of paying off a mortgage upon the land of C, cannot be held as garnishee of C, because there is no privity of contract between A and C. Neither could he be held as the garnishee of B, because he holds the money for a specific purpose in the interest of C.

62. Same subject—Trust funds.—For the reasons above stated it is quite generally held that trust funds are not the subject of garnishment.¹⁴ For example, where a person has been legally authorized to collect the debts due a firm and distribute the proceeds among the firm's creditors, a performance of the trust thereby created cannot be defeated by making him respond as garnishee in a suit afterwards brought by one of the creditors. The trustees of a legatee cannot be charged as garnishee in a suit against him, if charging them would defeat the bequest. But they might be so charged for a surplus remaining in their hands after an execution of their trust.

¹⁴ *White v. Jenkins*, 16 Mass. 62; *Brigden v. Gill*, 16 Mass. 522; *Peninsular Savings Bank v. Union Trust Co.*, 127 Mich. 355, 86 N. W. 798; *Blackland v. Garesche*, 56 Mo. 267; *Sweet & Sweet v. Read & Richards*, 2 R. I. 121; *Chase v. Currier*, 63 N. H. 90; *Steib v. Whitehead*, 111 Ill. 47.

If the relation of the defendant to the fund is that of a trustee and the person summoned as garnishee is the agent of the defendant to hold it, the fund is exempt from garnishment because only property and funds belonging to the defendant in his individual right may be reached.

63. Same subject—Money in the custody of the law.—In Massachusetts, at an early day, it was announced that a public officer having funds in his hands by reason of his official position cannot be held as a garnishee; and that doctrine, in the absence of express statutory authority, has been followed in all the states. Funds in the hands of the clerk of a court by order of the court cannot be reached by proceedings in garnishment by a creditor of a claimant to the funds. Funds in the hands of a receiver, appointed to wind up the affairs of an insolvent corporation, are exempt. His authority to collect the debts due the corporation and make distribution among its creditors is derived from the court and funds so collected cannot be disturbed except upon order of the court. Property held by an administrator or executor is in the same class. It is within the control of the court, to be used in paying the debts of the deceased, and for distribution among heirs or legatees.

A frequent application of the doctrine has occurred where attempts have been made to reach funds in the hands of a sheriff collected on execution. For example, on execution in favor of A against B the sheriff by levy and sale of B's property has received a fund which the writ directs him to pay to A. C, a creditor of A, cannot garnishee the fund.

64. **Same subject.**—Not as an exception to the rule, but as a limitation upon its operation, it is held that the exemption stated in § 63 ceases when the person holding the fund discharges his official duty with reference to it. For instance, in the example given about money collected on execution, while the Sheriff could not be garnisheed by a creditor of A, he could be garnisheed by another creditor of B for any surplus remaining in his hands after paying A. The mandate of the writ was to make out of the property of B an amount sufficient to satisfy the judgment, and when that was done by sale of B's property and the payment to A of the amount of his judgment, the Sheriff's right of custody ceased. B had the right to demand and sue for the surplus. The obligation of the sheriff to him was personal.

For like reason, it has been held that an administrator, after the estate has been fully administered, the share of each distributee definitely ascertained and an order for payment entered by the probate court, may be garnisheed by a creditor of a distributee.

65. **Garnishee's liability as debtor.**—Coming now to consider the garnishee's liability by reason of his indebtedness to the defendant, it may be observed that it is governed by many principles in common with those already mentioned under the other head,—his liability as a holder of the defendant's property. In practice, the most frequent resort to the remedy is where the garnishee is a debtor.

The aim of the proceeding being to invest the plaintiff with the right and power to collect from the gar-

nishee a debt due from the latter to the defendant and to appropriate it to the satisfaction of the defendant's debt to him, it is a controlling principle that the defendant shall have a cause of action, present or future, against the garnishee. It is in effect a suit by the defendant against the garnishee, for the use of the plaintiff, commenced and conducted without reference to the defendant's concurrence, and, in many instances, against his opposition, and in some jurisdictions, when the proceeding is commenced to collect an unsatisfied judgment already recovered by the plaintiff against the defendant it must be conducted in the name of the defendant against the garnishee.

66. **Same subject.**—In the absence of statutory exception, it is a general rule that the debt of the garnishee must be one that is payable in money.¹⁵ Hence, when the garnishee acknowledged an obligation to the defendant payable in work and material, it was decided that he could not be charged. The basis for the rule is that the court has not power to interfere with the contract between the defendant and the garnishee and compel the latter to pay money when he is willing, perchance, to perform according to the terms of his obligation. Still, there is no reason why the garnishee should not be held where he has refused to perform and damages resulting from a breach of the contract are capable of being reduced to certainty by a definite standard.

¹⁵ *Mims v. Parker & Coffman*, 1 Ala. 421; *Avery & Sons v. Lockhard*, 75 Ala. 530; *Capes v. Burgess*, 135 Ill. 60, 25 N. E. 1000; *Wrigley v. Geyer*, 4 Mass. 102.

Generally it is unnecessary that the debt from garnishee to defendant be due so that the plaintiff may have judgment against the garnishee; but issuance of execution and all steps to collect will be suspended until the date on which the debt becomes due.

67. Same subject.—The debt must be absolutely payable, however, at present or at some future time, and not be dependent on a contingency. If the contract be of such a nature that it is uncertain whether anything will ever be due under it, it will not constitute a credit subject to garnishment; for that cannot properly be called a debt, which is not certainly payable, either at the present or some future period.¹⁶ For example, where a son gave a bond to his father for the payment of certain sums of money at fixed times in each year during his father's life, it was held that he could not be charged as garnishee by a creditor of the father for anything not payable at the time, all future payments being contingent upon the life of the father. So, where a bill is payable only on certain conditions or on a contingency, it cannot be reached prior to the fulfillment of the conditions or the happening of the contingency. So long as it is uncertain whether the garnishee owes the defendant he cannot be charged, as the plaintiff can have no greater right by subrogation than the defendant has directly against the garnishee.

68. Same subject—Promissory notes.—It is a general rule that the maker or endorser of a promis-

¹⁶ Smith v. Gilbert, 71 Conn. 149, 41 Atl. 284; Williams Bros. v. Young, Iowa 140; Sayward v. Drew, 6 Greenl. 263 (Me.); Grimsrud v. Linley, 9 Wis. 632, 85 N. W. 410; Evans v. Rector, 107 Wis. 286, 83 N. W. 292.

sory note cannot be made liable as a garnishee in an action against the payee prior to its maturity. An exception is made in a few jurisdictions to the extent that he may be liable provided it be made to appear that the paper has not passed into the hands of an innocent holder for value, without notice of the service of the garnishee summons. In all the states liability as garnishee will attach to him after maturity, provided the defendant is still the owner of the note.

The reason for the rule is to avoid the danger of the garnishee's having to pay the note twice. The obligation of the maker of a promissory note is to the holder. His promise is to pay to the payee or to any person to whom the payee may assign the note. The payee may assign it and thereby transfer the maker's obligation to a third party. That may be done without notice to the maker. If before maturity of the note a judgment in garnishment should be rendered against him and afterwards paid, he would still be liable to an innocent purchaser, who took from the payee without notice of the garnishment.

Again, while the maker of such paper knows that he owes somebody, it is not certain that he owes the payee named in it. How can he, when summoned as garnishee, answer that he owes the maker? Even if he knew at the time of being served with summons that the payee held the note, what assurance has he when judgment is moved for against him that the payee has not in the meantime by endorsement changed his obligation, so as to require him to pay to another party?

69. **Same subject—Co-debtors.**—Where several

Persons are jointly and severally liable for a debt, any one of them may be held as garnishee for the whole debt. His liability in that regard is identical with what it would be in a suit by the defendant against him directly. In such a case, however, it is safer to proceed against all the joint and several debtors if they be within the jurisdiction of the court; or a payment to the defendant afterwards by one of the others without notice of the garnishment would release the garnishee.

Where the liability is joint merely, then all should be garnisheed; otherwise, the one served as garnishee will be discharged. But if part of the joint obligors reside out of the state, so that service may not be had upon them, the attaching creditor may obtain judgment against all who can be served, provided he includes all in his writ.

The decided weight of authority is that partnership credits cannot by garnishment be taken to pay the individual debt of a member of the firm.¹⁷ To illustrate, A owes the partnership firm of B and C. B cannot maintain a suit upon the obligation against A, because A owes B and C jointly and not B individually. So, if D, a creditor of B, should recover judgment against the latter, which he is unable to collect by the ordinary process of execution, he could not through garnishment take what A owes B and C to satisfy the debt of B.

¹⁷ *Winston v. Ewing*, 1 Ala. 129; *Church v. Knox*, 2 Conn. 514; *Ripley v. Peoples Sav. Bank*, 18 Ill. App. 430; *George v. Wamsley*, 64 Iowa 175, 20 N. W. 1; *Stillings v. Young*, 161 Mass. 287, 37 N. E. 175; *Sheedy v. Second Nat. Bank*, 62 Mo. 17; *Lyndon v. Gorham*, 1 Gallison 367, 15 Fed. Cas. No. 8640.

CHAPTER V.

MANNER OF ENFORCING THE REMEDY.

70. **Affidavit necessary to procure process.**—The application for garnishee summons, whether made before or after judgment by the plaintiff against the defendant, must be supported by affidavit. This is an absolute necessity, because the court can acquire jurisdiction only through process predicated upon affidavit. Also the record must affirmatively show that one was filed. A mere recital in the writ that one was filed is not sufficient.¹⁸ If filed before judgment, the affidavit should contain all the essentials of an affidavit in attachment heretofore mentioned. In other words, it must set up the amount of the plaintiff's claim and some existing ground of attachment against the defendant. In some of the states the essentials for procuring an attachment writ and a garnishee summons may be embodied in one affidavit. In such case the attachment writ, in addition to commanding the officer to summon the defendant and to levy upon his property, will contain a command to summon the garnishee. If the application be made after judgment, the affidavit, as a general rule, must recite the recovery of the judgment, the issuing of an execution, the return of the execution unsatisfied, the want of property in possession of the defendant sub

¹⁸ *Paine's Lessee v. Mooreland*, 15 Ohio, 435; *Wells v. American Express Co.*, 55 Wis. 23.

ect to execution and the belief of the plaintiff that the person named as garnishee is indebted to or holds property of the defendant.

71. Same subject.—The statutes differ as to what the affidavit should contain, and a good one in one state might be entirely insufficient in another. The remedy being one unknown to the common law, the affidavit should contain the statutory requirements in the jurisdiction where the proceedings are pending.

While the affidavit is usually sworn to by the plaintiff, most, if not all, the states allow the plaintiff's agent or attorney to perform that office. Any number of garnishees may be embraced in one affidavit; and they may be proceeded against because of their joint liability to the defendant or because of their several liability. Corporations, partnership firms, persons not partners, but liable on joint obligations, and persons liable individually, may be named in one affidavit and proceeded against in one writ. Whenever a joint liability is claimed, however, it should be so stated in the affidavit.

Although the affidavit must be positive in reciting the amount and character of the indebtedness from the defendant to the plaintiff, the statement as to the liability of the garnishee to the defendant is sufficient, if made upon information and belief. The reason is apparent: The plaintiff is presumed to know all the facts which constitute his claim against the defendant, whereas no such presumption obtains against him with reference to the relations existing between the garnishee and the defendant.

72. **Bond.**—Where the proceeding is commenced before the recovery of judgment by the plaintiff against the defendant, it is in the nature of attachment, and in that case such bond as is required in attachment is required in most of the states. Such provision, it would seem, is a wise one, because injury to a defendant might arise from the wrongful suing out of garnishment process the same as in the wrongful suing out of an attachment writ. To illustrate: the seizure of the defendant's goods on a fictitious claim of the plaintiff or in case of a valid claim, where no cause of attachment exists, constitutes an injury. The wrongful tying up of a fund or property in the hands of a garnishee when the defendant is entitled to it is likewise an injury. The reason for a bond to indemnify the defendant is as strong in the one case as in the other.

But where the garnishment is commenced after the plaintiff has recovered judgment against the defendant, the proceeding is in aid of execution and so there would seem to be no necessity for a bond.

Where the statute provides for a bond the prime purpose is to secure the defendant against any damage that may result from delay or otherwise, and is regarded as a preliminary step to be made in order to give the court jurisdiction to appropriate the defendant's credits or property in the hands of the garnishee.

73. **The writ.**—A proper affidavit having been filed and bond executed, where the statute requires a bond, the next step is the issuance of the writ or notice to the garnishee. This being a ministerial and

Not a judicial act, it is usually performed by the clerk of the court and follows as a matter of course. Its form and requisites are regulated by statute and in drafting it great care should be observed to see that the provisions of the statute are followed. In some jurisdictions, where the plaintiff proceeds in attachment before judgment, it may be embraced in the writ of attachment. In such case the writ, after directing the sheriff to summon the defendant and seize and hold his property, commands him to summon the garnishee named. In other jurisdictions, the garnishee summons is a separate and distinct writ.

In a few of the states the summons is issued by the plaintiff's attorney. Although it does not then appear so solemn an instrument as a writ issued by the court's clerk and bearing the court's seal, it runs in the name of the state to the garnishee and must be served by the sheriff or some other public official authorized to serve writs. Wherever that practice obtains, the affidavit is annexed to the summons. In substance, it commands the garnishee named in the annexed affidavit to appear within a date named and make full and complete answer touching his indebtedness to the defendant or his possession of any property belonging to the defendant.

74. Service of the writ.—In the absence of express statutory provision, service of a garnishee summons may be made by any person authorized to serve any other process in a personal action. The service must be personal, however. The garnishee must have actual notice by reading the summons to him, by leaving a copy with him, or by leaving a copy at his usual

place of abode in such manner as the local statute may require for getting personal service upon the defendant in an ordinary action at law. Service by publication will not answer.

A non-resident may be a garnishee, provided he is found within the state and served with process—because by being served within the state he is amenable to the jurisdiction of the court. In a few of the states it is held that a non-resident who is only temporarily within the state cannot be subjected to garnishment; but that is not the general rule, and in the absence of a statutory inhibition there appears no good reason for so holding. Of course, the court can exercise no control over property held by the garnishee out of the state, nor compel him to respond to the plaintiff on a liability to the defendant enforceable only in the garnishee's own state. But as to a debt which the garnishee owes the defendant, and for which the defendant may maintain an action within any state where he may obtain personal service upon the garnishee, why should the latter be exempt from this character of process solely because his presence in the state is temporary?

75. Same subject.—If the defendant is within the jurisdiction of the court, so that service can be had on him, he should be notified, because he has the right to appear and assert any claim of exemption or otherwise that he may have in the matter. In fact, some of the statutes require the garnishee summons to be served upon him just as it is served upon the garnishee, or to show some sufficient reason why it cannot be served.

It is the duty of the officer to endorse upon the summons the manner in which he has served the same, and where that does not appear it will work a discharge of the garnishee and render void any proceedings that might be entered against him because of failure to answer.

76. Amendments.—The affidavit, writ, bond, summons, and officer's return are open to amendment under the rules which obtain in applications for amendment of those instruments in proceedings by attachment. As the rules governing such applications were fully considered in Part I, Chapter III, they will not be again discussed at this place. The reader is referred to §§ 43-47, and the entire subject of amendment is dismissed with the statement that all proceedings in garnishment are open to amendment to the same general extent that proceedings in attachment are.

77. Answer of the garnishee.—On having been served with summons, it is the duty of the garnishee to answer. The answer is usually required to be on oath and should disclose all the facts touching his liability to the defendant to the end that the court may decide intelligently. A failure in that regard might result in his being charged when he ought not to be, or of his escaping liability when he ought to be charged.

Under the practice in a few of the states, he files one answer in which he sets forth the facts showing his relations with the defendant, much like the answer of a defendant in a suit in equity. In other states, special interrogatories are filed by the plaintiff and

to each one of them the garnishee is required to make a distinct answer. Whichever practice prevails, he must disclose all the facts accurately and distinctly.

If he holds the fund sought to be reached in trust, he should disclose that fact and resist judgment upon that ground; otherwise, should a judgment be rendered against him he could be compelled to pay again by the party for whom the trust fund was created. If the fund is in the custody of the law, as heretofore explained, he should set that forth. In short, if he knows of any fact that should exempt the fund from attachment by the plaintiff, or of any fact that has destroyed the relation of debtor and creditor previously existing between him and the defendant, he should disclose it.

78. Same subject.—He is not confined to his personal knowledge of facts. Information received from others, if of a reliable nature and believed in by him, should be stated. But he should avoid evasion and equivocation. An evasive answer will be treated as a nullity and any equivocation will subject the whole answer to suspicion. The important points to be attained are fullness and explicitness. In accordance with a universal rule of the courts, ambiguous and misleading statements will be construed against him.¹⁹ This works no hardship. Opportunity has been given him to collect the facts and to mature his responses. While in one sense his position may be regarded as that of a witness, he must in

¹⁹ Parker v. Page, 38 Cal. 522; Brainard v. Shannon, 60 Me. 342; Reinhart v. Empire Soap Co., 33 Mo. App. 24; Dawson v. Maria, 15 Ore. 556; Sampson v. Hyde, 16 N. H. 492; Grever v. Culver, 84 Wis. 295.

another be regarded as a defendant. In effect he is a defendant, because the proceeding is to collect by court action a debt which it is alleged he owes the defendant.

If the garnishee be a corporation, the answer may be made by an officer conversant with the facts, and in most of the states it may be made by any agent or attorney of an individual garnishee, provided he shall be acquainted with the facts.

79. Same subject.—Where interrogatories are used, a wide range of latitude is usually allowed in endeavoring to ascertain whether the garnishee can be made liable. Almost every variety of question bearing upon this point may be asked and an answer compelled. Still there must be a limit. The interrogatories must be confined to such matters as under the law necessarily involve the garnishee's liability. Thus, where a justice of the peace was made a garnishee and the question was put to him how many judgments were entered on his docket in favor of the attachment defendant, when, against whom, and for what amounts, it was held that the question was improper for the reason that it did not involve liability on the part of the garnishee.²⁰

The court will protect the garnishee from answering impertinent questions and especially such as involve disclosures touching his guilt in the violation of a public law.²¹ Thus, when a garnishee was asked whether he had not received usurious interest of the

²⁰ *Corbyn v. Bollman*, 4 Watts and Sargeant 342 (Pa.); *Lyman v. Parker*, 33 Me. 31.

²¹ *Crossman v. Crossman*, 21 Pick. 21 (Mass.); *Boardman v. Roe*, 13 Mass. 104.

defendant, it was held that he could not answer affirmatively without criminating himself and, therefore, should not be compelled to respond.

80. **Answer before a justice of the peace.**—In those states where garnishment proceedings may be had before a justice of the peace written interrogatives, as a general rule, are not required there. The garnishee is examined orally and the answers are oral. The same rules apply, however, that apply where written answers are required. The garnishee is charged with the same duty as to making disclosure and is entitled to the same protection that he would be in a court of record.

81. **Effect of the answer.**—Under some of the early statutes the answer was conclusive of the facts alleged and could not be controverted; but the more recent statutes provide that the plaintiff may, at his option, traverse the answer and have an issue made up for trial by a jury. The modern rule is that the answer is presumed to be true, and will stand as such until overcome by competent evidence.

Whenever the plaintiff shall be of the opinion that the garnishee has not truly answered he may notify him that he elects to take issue on his answer. His election is indicated to the court by motion, affidavit, or in such other manner as the statute may prescribe, and a jury is empaneled to try the issue. Evidence will be heard and the trial will be conducted just as it would be if the suit were one by the defendant against the garnishee.

In the trial the garnishee may avail himself of all the defenses he could in a suit brought directly

against him by the defendant. Thus, if the garnishee have a counter-claim against the defendant it may be set off; if the consideration for the obligation has failed, or the claim be barred by the Statute of Limitations, it may be shown. If he so desire, the garnishee may defend the principal action against the defendant.

82. **Same subject.**—Where the garnishee admits a debt to the defendant, judgment will be rendered against him as a matter of course, if judgment shall already have been recovered by the plaintiff on his claim against the defendant. Otherwise, judgment will be deferred until that issue shall be decided. To illustrate: A having recovered judgment against B and being unable to collect it by means of execution, garnishees C who admits a debt to B; judgment for the amount of the debt should be rendered against C at once. But if suit between A and B is still pending, judgment against C will be deferred until A shall recover against B. In the event of A failing to recover judgment against B, C will be discharged.

In case the garnishee is found to be indebted upon trial of issue raised by a denial of the answer, the entry of judgment against him will be made or deferred in same manner as where admitted.

83. **Right of defendant and others in the proceeding.**—The defendant, if he so desire, may appear and defend the proceedings upon the ground that the debt of the garnishee or any property held by him is exempt from execution against the defendant, or that for some other reason it is not liable to garnishment. He may participate in the trial of any issue between

the plaintiff and the garnishee for the protection of his interests.

Any person claiming the fund or property in the garnishee's possession may appear and assert his claim by interpleading and thereby raise an issue as to his rights. If the evidence shows that the fund or property is his, and not the defendant's, the court will so declare and discharge the garnishee. In some states the statute provides that if the garnishee's answer discloses that some third party claims the fund, such party may be brought into court by process and compelled to set up his claim. The modern tendency is to have all disputed claims and rights to the fund or property, whether asserted by the garnishee, the defendant, or some third party, settled in one suit.

Any party to the record, plaintiff, garnishee, defendant or claimant, if dissatisfied with the decision of the court may appeal to a higher court and have the proceedings reviewed in the same manner as, under the statute, other proceedings may be reviewed.

84. **Refusing or neglecting to answer.**—A garnishee refusing to answer may be considered in contempt of court and dealt with accordingly. But the usual course is to enter a conditional judgment against him for the full amount of the plaintiff's established demand, the presumption being that the garnishee is indebted to the defendant to the full amount of the plaintiff's demand. In most of the states, however, the judgment is not final. After it is entered another writ, called a writ of scire facias, issues which calls upon him to show why the judg-

ment should not be made final. It is made returnable at the next term of court, or to a day fixed by the judge, at which the garnishee may answer and put in a defense, as he could have done in the first instance. If he fails to answer, then the judgment will be made final—depending, of course, upon the establishment of the plaintiff's claim against the defendant.

85. Judgment against the garnishee.—It is provided in some of the states that the garnishee may, after filing answer showing that he owes the defendant, or has in his possession property belonging to him, exonerate himself from further liability by paying the fund into court or delivering the property to the officer.

Where there is no such provision, or there being none the garnishee does not avail himself of it, judgment will go against him as heretofore explained. In some of the states it is held that the judgment should be entered in the name of the original defendant for the use of the plaintiff. This is logical because the proceeding is really a suit to determine the garnishee's liability to the original defendant.

The judgment against the garnishee must be for a sum certain. In no event may it be greater than the amount recovered by the plaintiff against the defendant. Thus, although the garnishee admit an indebtedness of \$1,000 to the defendant, if the plaintiff recover a judgment against the defendant for \$500, the judgment against the garnishee for \$500 only should be rendered and he would be answerable directly to the defendant for the overplus.

BIBLIOGRAPHY.

Drake on Attachment is a standard work. Other good treatises are *Wade* on Attachment and Garnishment; *Waples* on Attachment and Garnishment; *Shinn* on Attachment and Garnishment.

As attachment proceedings are largely regulated by statute, the student is advised to read, in connection with this article, the statutes of his state upon the subjects of attachment and garnishment.

QUIZ QUESTIONS

ATTACHMENT AND GARNISHMENT

(The numbers refer to the numbered sections in the text.)

- 1-2. Define attachment and give an account of the origin of each kind.
3. How are attachment laws construed by the courts?
5. In what character of action may a plaintiff resort to attachment?
- 5-7-8. For whom and against whom may the remedy be used?
9. What are the three general classes into which the grounds of attachment may be divided?
10. State the principle upon which the right of attachment against the property of non-resident debtors rests.
1. A resides in one county but carries on a mercantile business in another county of the same state, to which he has never gone. He is indebted to B for services rendered in the business. During A's absence in another state to which he has gone to purchase goods, may B maintain attachment in the county where the business is conducted?
2. What is the character of fraud on the part of a debtor in disposing of his property that will justify attachment?
4. On what principle is based the right of a creditor to attach the property of a debtor who without fraudulent purpose is removing his property from the state?
5. A, while engaged in business as a retail merchant, made an untrue statement in writing to a commercial agency for the purpose of obtaining a false rating. He afterwards applied to B, a wholesale merchant, for the purchase of a large amount of goods on credit. B sold and delivered the goods upon a report of the commercial agency based upon

A's false statement. May attachment be sustained against A, he never having made representations to B touching his financial condition?

- 16-18. State the essential allegation in an affidavit for attachment.
19. In the trial of an attachment case, the evidence failed to show that the defendant had within two years made a fraudulent transfer of his property, as charged in the affidavit, but did show that he was about fraudulently to dispose of it, a sufficient ground, but one not charged. How may the plaintiff avail himself of the evidence?
20. What is the purpose of requiring the plaintiff to give bond before suing out a writ of attachment?
21. A and B are indebted to C on a joint obligation. There is an existing cause for attachment against A but none against B. C sues A and B on the joint obligation and desires to proceed in attachment. Who should be made parties to the bond?
- 22-23. How should an attachment bond be executed?
- 25-26. What are the duties of the officer regarding a writ in attachment: with reference to personal property; with reference to real property?
- 28-30. What is the duty of the officer with reference to possession of personal property?
31. What is his duty with reference to perishable property?
- 32-33. What is the difference between a forthcoming bond and a dissolution bond so far as such bonds relate to proceedings in attachment?
- 34-35. Explain the difference between personal service and service by publication.
37. In a suit brought by A against B the sheriff levied upon and took possession of personal property. The only service was by publication. After proof of service had been made but prior to the day set for hearing of the cause, the attached property was destroyed by fire. May the court proceed with a hearing and enter judgment?
38. What duty devolves upon the plaintiff other than making affidavit, filing bond and seeing that a writ is issued and levied upon the property?
39. A plaintiff, who has obtained service upon the defendant

- by publication only and has charged as ground for attachment the fraudulent disposition of property, shows upon hearing a clear cause of action against the defendant but fails to show the fraudulent disposition of property. What should the judgment be?
40. If the defendant in an attachment proceeding appear, what two lines of defense may he interpose?
41. How may the issue on the attachment be raised?
42. In an attachment proceeding between A and B, C, not named in the proceedings at all, claims the property which has been attached by the sheriff. In what manner should he assert his claim?
- 43-46. What amendments are allowed: first, to the affidavit, second, to the bond, third, to the writ?
- 48-49. State some ground on which dissolution of the attachment may be obtained.
52. What is the effect of an order of the court dissolving an attachment?
53. In a case where the defendant has been personally served and levy has been made upon his property, what should be the order of the court, the plaintiff being successful, as to the defendant and as to the property levied upon?
54. What liability does the officer incur who fails promptly to advertise and sell property which has been adjudged liable to attachment?
55. Define garnishment.
56. How is it distinguished from attachment?
- 57-58. What are the two kinds of garnishment? Give an example of each.
59. Who may be made garnishees?
- 60-61. In what two respects may a party be held liable as a garnishee?
62. In a suit by A against B, C is summoned as garnishee and answers that he has funds belonging to B which he has received from X for the purpose of paying off a mortgage upon B's land to D. Should he be held as garnishee?
- 63-64. A, a receiver appointed to wind up the affairs of an insolvent corporation, answers as garnishee that he holds funds realized from the sale of personal property which he will report to the court. Why is he not liable, the evi-

dence showing that the defendant is a creditor of the corporation?

65. What is the basis of the garnishee's liability to the plaintiff?
- 66-67. A, summoned as garnishee in the suit of B against C, answers that he is in debt to C, but the obligation requires services of himself and team for one month. Is he liable?
68. What is the general rule with reference to making the maker of a promissory note liable as garnishee?
69. What is the prevailing rule with reference to reaching partnership credits by garnishment to pay the individual debt of a member of the firm?
- 70-71. State the leading essentials required in an affidavit for a garnishee summons.
72. What is the purpose of requiring a bond before the issuance of a garnishee writ?
- 73-74. What are the essentials of a summons in garnishment and by whom may it be served?
76. How may a defective affidavit, writ, bond or officer's return be cured?
77. Explain the two methods under which the garnishee may answer. What is his duty as to disclosing the facts?
78. How should a corporation summoned as a garnishee make answer?
- 79-80. What protection is extended to the garnishee in answering interrogatories?
81. Where the plaintiff is of the opinion that the garnishee has not truly answered, how may the truthfulness of the answer be tested?
82. Where the garnishee admits a debt due to the defendant, when will the court render judgment against the defendant, and when will he defer judgment?
83. What are the rights of the defendant in the trial of an issue as to the truthfulness of the garnishee's answer? How may a third party claiming a fund or property in the hands of a garnishee have his rights determined?
84. What is the effect of a refusal or neglect upon the part of the garnishee to answer?
85. What is the limit of a judgment against a garnishee as to amount?

PART III

JUDGMENTS AND EXECUTIONS

BY

JOHN R. ROOD, LL.B.*

JUDGMENTS

CHAPTER I.

NATURE AND ESSENTIALS.

1. **In general.**—The judgment is the last step in the following series: A suit is instituted in a court to determine the rights of conflicting claimants in some matter; the appearance of the defendant and his subjection to the jurisdiction of the court are obtained by his voluntary appearance or by service of process on him; the matter to be decided is presented by the pleadings to the court for decision; the evidence to establish and refute the claim is submitted to the court; the case is argued; the verdict of the jury is rendered, if there be a jury, or if not,

* Former Professor of Law, University of Michigan Law School. Author of: "Law of Garnishment"; "Attachments, Garnishments, Judgments, and Executions"; "Wills"; "Digest of Important Criminal Law Cases"; "Cases on Estates in Land." Contributor to legal periodicals.

the court finds the facts; the next step is the conclusion of the law from all this, and this conclusion to be drawn by the court is called the judgment or decree. A word or two as to what the judgment is not may help to understand what it is. The judgment is not the reason given by the court for deciding the case as it does, sometimes called the opinion; it is not the ruling of the court on the admission of offered evidence; it is not the instruction given to the jury to enable it properly to pass on the evidence; it is not the finding of facts by the court or jury from the evidence submitted; it is not the entry made by the clerk on the records of the court as to what was decided; no interlocutory order made by the court during the progress of the cause, such as that security for costs be given, or that the case be continued over to the next term, is a judgment; but the judgment is the final disposition actually made of the case by the court, as a result of all that precedes.

When analyzed, a judgment is reached thus: (1) the pleadings—A says that B took A's cow and converted it to B's own use, wherefore A is damaged to the extent of \$50, to which B makes a general denial; (2) the verdict or finding of facts—the jury says that from the evidence adduced it appears and the jury finds the facts to be as A has said; (3) the judgment—"wherefore it is considered and adjudged by the court now here that A do recover of B the sum of \$50 damages, together with his costs to be taxed, and that he have execution therefor." A judgment, therefore, may be defined to be the sentence of the law, as declared by the court, upon the

matter submitted to it for decision by opposing claimants.

2. **Elements of jurisdiction.**—Jurisdiction is the authority to hear and determine; and in order that it may exist the following are essential: (1) a court created by law, organized and sitting; (2) authority given it by that law to hear and determine causes of the kind in question; (3) power given it by law to render a judgment such as it assumes to render; (4) authority over the parties to the case if the judgment is to bind them personally as a judgment *in personam* (against the person), which is acquired over the plaintiff by his appearance and submission of the matter to the court, and is acquired over the defendant by his voluntary appearance, or by service of process on him; (5) authority over the thing adjudicated upon by its being located within the court's territory, and by actually seizing it if liable to be carried away; (6) authority to decide the question involved, which is acquired by the question being submitted to it by the parties for decision.

Looking over the foregoing six essentials it will be noticed that the first three are matters of law, and the last three matters of fact. The law essentials are determined by examination of the law books in which are contained the statutes creating the court and defining its powers. The fact essentials of jurisdiction are determined by examining the pleadings and papers in the case, to determine whether the parties all appeared or were served, to determine whether the judgment assumed to be rendered is responsive to the prayer for relief in the complaint

or exceeds or departs from it; and by examining the facts outside of the record to ascertain whether as a matter of fact the thing was within the court's territory.

3. **Same subject—Illustrated.**—Take a supposed case, and analyze it for the purpose of determining whether these several essentials are present. A sues B in a justice court for taking A's cow and converting it to B's own use, wherefore A prays that he be awarded damages against B in the sum of \$50.

1. The first essential of jurisdiction is that there be a court created by law, organized and sitting. On inspecting the statutes we find that the legislature has created such a court, and on inspecting the situation we ascertain that the person assuming to act as justice in the case was at least *de facto* such officer, though not perhaps duly elected.

2. Looking at the statutes again, we see that justice courts may hear and determine actions for conversion of goods. A court of purely criminal jurisdiction could not do that. The court created to administer the estates of deceased persons, pass on the accounts of guardians and control their actions, and to determine who is sane and who insane, usually is not authorized by statute to try cases such as this.

3. Examining the statute once more, to see whether it authorizes a justice court to give a judgment for damages to the sum of \$50, we find that such authority is given. Observe that the point now under discussion is not whether the facts alleged in the pleadings, or the evidence given at the trial, warranted the court in giving such a judgment. The

question is not whether the court was warranted in giving such a judgment in this case, but whether it was authorized to give such a judgment in a proper case. Whether this is the proper case for such a judgment is for the court to say; and if in this the court errs, the judgment is not void, it is merely erroneous and liable to be reversed on appeal, if appeal lies. Until and unless reversed it is as binding as if it were perfectly regular and proper.

4. Turning to the files and record in the case, we find that the plaintiff appeared and submitted himself to the jurisdiction of the court by requesting the summons to the defendant to issue; and that jurisdiction over the defendant was obtained by a summons being issued and served on him by a constable, commanding him to appear and defend.

5. As to whether the cow was within the court's territory, that is immaterial in this case, since the court is not asked to render a judgment affecting title to the cow, but only a judgment for damages. Neither the title to nor the possession of the cow is to be affected by the judgment. It is to be a judgment in personam merely, that is, against the defendant personally. If it were in replevin for the cow, then it would be important to determine whether the court had jurisdiction of her.

6. As we look at the pleadings to ascertain whether the court was asked to give such a judgment as was rendered, it appears that the plaintiff prayed for a judgment in damages. Therefore, the court had power to award damages. It is not material that neither the complaint or declaration of the plain-

tiff nor the proof at the trial showed that he had any title to the cow, or that she was worth \$50, or that he had suffered any loss by reason of her being taken by the defendant; nor is it material that he did not show that the defendant took her. On a demurrer to the pleading for defect in any of these respects, or on a motion to render judgment for the defendant at the close of the plaintiff's proof at the trial, these points would be material. But in the matter of jurisdiction the question is not whether a cause of action is stated or proved, but whether the relief given was prayed for. It may be that in a suit by a man against his wife praying cancellation of a deed he had executed to her it appears that grounds for divorce exist. But a decree of divorce in such a suit would be merely void, not because the court has no power by law to give such a decree, for the court that can vacate conveyances is usually empowered by law to grant divorces, but because such a decree would not be responsive to the prayer in this particular case. These elements of jurisdiction will now be examined in detail.

4. **Nature and essentials of a court.**—Since a judgment is a sentence of the law pronounced by the court it is necessary to inquire what a court is.

Created by law. A court is an institution created by law to decide between opposing claimants as to alleged wrongs, property rights and personal rights. Since a law is a rule of action, prescribed by the supreme power in a state, it follows that an institution created by the supreme power for the time being for this purpose is a court.

Overpowering force of rebellion. It may be that this power is illegitimate, rebellious, and treasonable; but there is no alternative. If justice is to be had at all it must be had at the hands of the powers that be. The judgments of their tribunals must be respected or the people of the unfortunate community denied all justice until lawful order can be restored. During the war between Texas and Mexico, a Mexican court adjudicated the title to land lying in the district afterward acquired by Texas, and this judgment was later offered in evidence in a Texas court as part of the chain of title to this land. In holding this judgment binding, the Texas court said: "The essential good of the nation and the peace and tranquillity of its citizens in relation to a branch so important as the judicial demands that those (judgments) should be legalized and be held as valid and subsisting; since if it were not so, a door would be opened to an innumerable multitude of complaints, reclamations, and attempts to undo all that had been done, so that nothing would be solid and stable. The fortune and property of the citizens would be consumed in the renewed expenses and damages which a multitude of suits would inflict; and the people would be buried in a terrible chaos of judicial anarchy, more transcendental and pernicious than the illegitimate dominion which it was designed to repudiate."¹

Exceptions. But when the judgment of such a court is offered in evidence in another country, whether it will be given effect depends upon whether

¹ Trevino v. Fernandez, 13 Texas 630.

that government has been recognized by the government of the state in which the last court sits.² And even in the same country, the legitimate court cannot recognize the acts of the rebellious government's court in so far as it determines rights of the lawful government or sanctions acts prejudicial to it. Thus, when investment by a guardian of his ward's funds in Confederate bonds was brought before a court after the close of the American rebellion, the order of the Confederate court confirming the investment was held to be no defense to the guardian, when sued by his ward in a United States court, because to sanction the investment in the rebellious government's bonds would be prejudicial to the government of the United States.³

Unconstitutional. While a court is an institution created by the supreme power in a state, it is the better opinion that the fact that the statute creating a court is unconstitutional is no ground for attacking the court's judgments collaterally. It would be a misfortune to litigants who have gone to great expense trying their cases in that court, and perhaps obtained as substantial justice as they would before any legitimate court, to find that their rights were in no way settled. Titles to property of great value might be rendered uncertain long after the judgment was given, if it were held that the effect of the judgment would be thus entirely destroyed. Public policy demands that judgments rendered by courts

² *Nueva Anna and The Libere, The Spanish Consul, Claimant*, 6 Wheat. 193 (U. S.).

³ *Lamar v. Micou*, 112 U. S. 452, 5 S. Ct. 221.

actually sitting under an assumed authority, although illegal, shall be recognized as valid, though afterwards the statute creating the court may be held to be unconstitutional.⁴

5. **Nature of the business.**—Courts must be distinguished from various other branches of the government, created for other than judicial purposes. A court is an agency of the state created to decide disputes between contending litigants. Other agents of the state have power to take testimony, swear witnesses, punish for contempt, hold their sessions at prescribed times and places, keep records of their doings, have a seal, and even pass upon claims. For example, the county board of supervisors sits at the county seat, has a seal and a clerk, keeps records of its doings, can subpoena witnesses, take testimony, punish for contempt, and audit claims against the county; yet no one would think that a board of supervisors is a court. The same may be said in a large degree of school inspectors, assessors, and other ministerial officers and boards. But all of these bodies act of their own motion, instead of the action being instituted by the complaint of one person filed before them requiring the answer of another. They do not act and decide between opposing claimants after hearing. They take such testimony as they please, or act without any testimony at all and upon their own information.⁵

6. **Organization and qualification of officers.**—Although there be a law creating such a court, there

⁴ Burt v. Winona & S. P. Ry. Co., 31 Minn. 472, 18 N. W. 285.

⁵ Stenberg v. State, 48 Neb. 299, 67 N. W. 190.

is in fact no court until the judge has been elected, a court organized and assembled. To constitute a court, therefore, there must be officers, time and place of sitting. If one acts who is not and does not claim to be a judge at all, but acts merely by reason of the claim being submitted by the parties to him for decision, his decision is not a judgment; but if he assumes to be the court and sits as such he is a *de facto* officer, and his decision between the parties is binding upon them though he may not be qualified to act as judge. His right to sit and decide cannot be questioned collaterally. To this there is some dissent, but it is the better view.

7. **Time of sitting.**—No court can be held on Sunday nor on certain holidays, and any attempt to pronounce judgment at such a time would be ineffectual and the judgment void.⁶ Certain courts hold sessions continuously except on holidays. But other courts have terms in which they sit, and other periods in which there is vacation. If the judge assumes to decide a case during vacation, even with the consent of the parties, his determination upon it is not the judgment of the court but merely the act of this individual judge. Judgment can neither be rendered nor vacated by the judge during vacation time.⁷ Of course the legislature may, by special act, authorize judgment by confession to be entered in vacation time, or authorize the judge to vacate judgments during vacation time; but in the absence of statute there is no such authority.

⁶ *Hemmens v. Bentley*, 32 Mich. 89.

⁷ *Gamble v. Buffalo*, 57 Neb. 163, 77 N. W. 341.

Courts' terms last from the beginning of the term until the beginning of the next term, unless sooner adjourned *sine die* (without day). The courts may adjourn the business from one time to another, and hold adjourned terms. During term time the court is in theory of law continually in session. The recess from the closing of business at night until court opens the next morning is not vacation time. Court can reassemble at any time from the beginning of the recess until the time appointed for reassembling. For example, a court was adjourned to reassemble at ten o'clock the next morning. Before that hour arrived parties desiring to take judgment by confession, stopped the judge in the corridor and induced him to indorse on the papers the memorandum: "Enter Judgment, E. Anthony, Judge." The clerk of the court entered judgment at large and issued execution before ten o'clock that morning. Under this execution property was levied on. On motion to quash the execution it was urged that there was no judgment because it was entered when the court was not in session; that it was the act of the judge only. The defendant also offered affidavits to show that the execution was issued before the entry at large on the record was in fact made, and argued that, therefore, there was no judgment on which the execution could issue. But the court held that the judgment was the sentence as declared by the court and not the record written by the clerk; that there are no fractions of a day; and that recess is not vacation time. The motion was denied and the court said: "The rule of the law is that the court is open from the first day of

the term as fixed by law until it is closed by the expiration of the term or adjourned sine die, and the term, though running through several weeks or months, is to be regarded as one day.”⁸

8. **Place of sitting.**—Courts must sit within the territory over which they have jurisdiction, and usually the law prescribes certain places for holding court. The chief court of the county is usually held at the county seat, a place designated by law. The place of holding justice court is usually determined by the wish of the justice himself. He can establish his office where he pleases within the township in which he is authorized to sit. But there are also statutes in most states restricting the place of sitting, and declaring, for instance, that he cannot hold court in any place where intoxicating liquors are sold. If a witness is too ill to attend court, the judge may adjourn and take his testimony at his bedside in a place where a court might have been established. But if a justice of the peace attempts to decide a case without assembling court, it could hardly be said that he is the court. The justice is not the court wherever he goes, and at all times. Thus, judgment entered by a justice of the peace upon a note on which suit had been brought before him, stating that he met defendant while crossing the street and he confessed judgment, without anything to show that the court ever assembled at any place at all, was held void.⁹ When a probate court assumed to sit at a town other than the county seat the judgment rendered by it

⁸ Jasper v. Schlesinger, 22 Ill. App. 637.

⁹ Tenny v. Filer, 8 Wend. 569 (N. Y.).

in so sitting was held to be void on collateral attack.¹⁰ But if the courthouse should burn down or for any reason be unsuitable for court to sit in, undoubtedly the court could assemble on the courthouse square, or in some adjoining building in the same town, and its determinations would not be subject to collateral attack on the ground that it did not sit at the place prescribed by law.

9. Power to try such causes and give such judgments.—All courts from the highest to the lowest are more or less limited in their jurisdiction as to the causes which they may hear and determine, such as civil or criminal, legal or equitable, such as arise on navigable waters, or such as relate to the disposition of the estates of deceased persons. Jurisdiction in this respect does not depend upon the facts alleged, but upon the relief prayed for. The jurisdictional question is: Can this court give such relief in any proper case? Whether the allegations and proof show this to be a proper case is not a jurisdictional question.¹¹

Every court has jurisdiction to decide every fact necessary to the determination of the cause before it. For example, every court can ask and determine whether John Doe was at a particular time sane or insane. This fact may become material in a criminal court in determining whether he is liable criminally for an act that he has done; in a civil court in determining whether he is liable on a contract he has made; in a probate court in determining whether the writ-

¹⁰ *White v. Riggs*, 27 Me. 114.

¹¹ *Hunt v. Hunt*, 72 N. Y. 217.

ing he made was entitled to probate as his will; in a court of chancery in determining whether the deed he made while in this condition should be set aside. Every court can decide every fact necessary to determine whether the prayer should be allowed in the particular case before it. One court has jurisdiction in criminal cases, another in civil cases; each in its sphere has jurisdiction of the subject matter. But the facts and the acts of the party proceeded against may be the same in a civil case as in a criminal case; as, for instance, in a civil action for false and fraudulent representations and deceit, and in a criminal action for obtaining property by false pretenses. Yet the court of civil power has no jurisdiction of the criminal action, nor vice versa, though each has power to pass upon allegations to the same facts.

10. Same subject—Depends on law defining powers and not on facts.—Jurisdiction in this respect can be determined by examining the law under which the court is organized and acts. For example, power by law to adjudge divorce from the ties of matrimony gives jurisdiction to decree divorce. Though the proceedings before the court from first to last of the testimony in an application for divorce should show that a state of facts does not exist which make a legal cause for divorce, yet it cannot be said that the court has no jurisdiction to render a decree for divorce. This element of jurisdiction is the power to adjudge concerning the general question involved, and it is not dependent upon the state of facts which may appear in a particular case, arising or which is claimed to have arisen under the general question. Juris-

diction is the power to act upon the general and, so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power.

If a suitor in an action for divorce does not establish a cause for divorce, jurisdiction to pronounce divorce does not leave the court. When he prays for divorce it is for the court to say whether he is entitled to it, provided it is a court authorized to give such a judgment in a proper case. If a court errs in granting divorce when it should not, as when no cause for divorce is either alleged or proved, the decree of divorce thus given is not void, but at most merely erroneous. On appeal it would be reversed, but on any collateral attack, it is conclusive.

11. **Same subject—Why so.**—Any other rule would render all judgments of no avail and all litigation endless, for whenever any judgment or decree was offered in evidence it would be open to the court in which such decree was offered to inquire whether the proof and allegations in the prior case justified the court in rendering the decree or giving the judgment it did. The result would be that whenever any judgment was offered in evidence the case would then be again tried. The judgment would amount to nothing, and so the next judgment would also amount to nothing. There would be no end to litigation. Hence, the only rule by which disputes can be put at rest is the rule which declares that when the court having power to try such a case and having the parties before it, gives judgment, that judgment shall be held binding until set aside by appeal or

other proceedings.¹² Thus, when a bill filed in chancery, under a statute empowering the court to entertain such bills, did not allege that the plaintiff was in possession of the premises,¹³ it was held that a decree rendered in favor of the plaintiff quieting the title was valid and not subject to collateral attack, though bills had often been dismissed in the same supreme court for failure to allege such fact in actions to quiet title. The fact was essential to a cause of action, but not essential to jurisdiction of the court to decide the case.

While jurisdiction in a proper sense means authority to hear and decide a cause, it is common to speak of jurisdiction in equity, or of the jurisdiction of the court of equity, as not relating to the power of the court to hear and determine the cause, but relating to whether it ought to assume jurisdiction, and hear and determine the cause.

12. Jurisdiction of the person.—It is a rule founded on the first principles of natural justice that no person shall be condemned till he has had an opportunity to be heard. Any sentence pronounced against him without giving him such opportunity amounts to nothing but an arbitrary edict, and is entitled to no respect in any tribunal assuming to act on the principles of justice. If a party voluntarily appears and submits to the court's jurisdiction, there is, of course, no need of notice to him for the purpose of giving him an opportunity to be heard. It has been held in England that citizens of a country

¹² *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129.

¹³ *Figge v. Rowlen*, 185 Ill. 234, 57 N. E. 195.

are so far bound by allegiance that service of process on them according to the law of that country, by calling them in the market square and at the wharf, gives the court jurisdiction over their persons, and enables it to give binding judgment in personam against them though they were in fact beyond the sea at the time, and never heard of the proceeding.¹⁴ Also similar views have been expressed by several of our state courts on service according to statutes providing for service at the last place of residence, or by delivery of a copy of the process to some member of the defendant's family, though he never in fact received such notice.¹⁵ But when a judgment on such service came collaterally in question before the Supreme Court of the United States it was declared void; and the court said: "Whether they all resided within the territory or not does not appear, nor is it a matter of any importance."¹⁶ From this decision it would seem, and on principle it is believed, that the same rule should apply as to what constitutes due process of law to obtain jurisdiction in personam, whether the defendant be citizen, alien, or resident of some other state.

13. Same subject—Non-residents.—Judgments against others than citizens on service of the sort above mentioned, though according to the law of the state where the court rendering such judgment sits, are in England held entitled to no respect in any other country, except as a proceeding in rem affecting prop-

¹⁴ *Douglas v. Forrest*, 4 Bing. (13 E. C. L.) 686 (Eng.), action on a Scotch judgment.

¹⁵ *Nelson v. Chicago, B. & Q. Ry. Co.*, 225 Ill. 197, 80 N. E. 109.

¹⁶ *Webster v. Reid*, 11 How. 437 (U. S.).

erty actually the subject matter of such prior suit, and within the court's power at the time of rendering judgment on it.¹⁷ When judgment against a non-resident has been rendered in personam on such service, it has sometimes been said that a personal judgment so rendered has no binding force outside of the state in which it is rendered, implying that in such state it may be valid and binding. In speaking of such a judgment the Supreme Court of the United States said: "But if the court has no jurisdiction over the person of the defendant by reason of his non-residence, and consequently no authority to pass upon his personal rights and obligations; if the whole proceeding, without service of process upon him or his appearance, is *coram non judice* (not before the court) and void; if to hold a defendant bound by such a judgment is contrary to the first principles of justice—it is difficult to see how the judgment can legitimately have any force within the state. The language used can be justified only on the ground that there was no mode of directly reviewing such judgment or impeaching its validity within the state where rendered; and that, therefore, it could be called in question only when its enforcement was elsewhere attempted. In later cases this language is repeated with less frequency than formerly, it beginning to be considered, as it always ought to have been, that a judgment which can be treated in any state of this Union as contrary to the first principles of justice, and as an absolute nullity, because rendered without any jurisdiction of the tribunal over the party, is

¹⁷ *Buchanan v. Rucker*, 9 East 192 (Eng.).

not entitled to any respect in the state where rendered. Be that as it may, the courts of the United States are not required to give effect to judgments of this character when rights are claimed under them. * * * Since the adoption of the 14th Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the state resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance.”¹⁸

14. Same subject—Exceptions.—The propositions announced in the preceding section must be taken with certain qualifications, as stated by the

¹⁸ *Pennoy v. Neff*, 95 U. S. 714, 732, 733.

court in the case just quoted from. The court said: "It is hardly necessary to observe, that in all we have said we have had reference to proceedings in courts of first instance, and to their jurisdiction, and not to proceedings in an appellate tribunal to review the action of such courts. The latter may be taken upon such notice, personal or constructive, as the state creating the tribunal may provide. They are considered as rather a continuation of the original litigation than the commencement of a new action. * * * Neither do we mean to assert that a state may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the state to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way; and that the judgments rendered upon such service may not be binding upon the non-residents both within and without the state. As was said by the Court of Exchequer in *Valles v. Dumergue*:¹⁹ 'It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed,

¹⁹ 4 Exch. 290 (Eng.).

even though he may not have actual notice of them.' We do not doubt that a state, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members. Parties becoming members of such corporations or institutions hold their interests subject to the conditions prescribed by law."²⁰

15. **Same subject—Service on corporations.**—The correctness of the propositions announced above as to service on corporations is now fully established. By consenting to be a corporation under the law of the state they consent to the mode of service provided by that law. Though organized under the law of some particular state they can do business in any other state only by complying with and assenting to the conditions imposed by the law of that state. By consenting to do business there they consent to be bound by the mode of service prescribed by the law of that state, and they are bound by such consent.²¹ But if they do no business there, they are not bound by service on their officers while the latter are casually there on their private business. The officer does not carry his official capacity with him to another state merely by going on his private business.²²

16. **Jurisdiction of the thing.**—If in a court of one state in a suit between A and B judgment is given

²⁰ *Pennoyer v. Neff*, 95 U. S. 714, 734-736.

²¹ *St. Mary's Franco-American Pet. Co. v. West Va.*, 203 U. S. 183, 27 S. C. R. 132.

²² *St. Clair v. Cox*, 106 U. S. 350.

that land in another state belongs to A and not to B, such judgment would not be binding on B in the courts of that other state. This is for the reason that a court cannot act so as to bind a thing beyond its territorial jurisdiction. But if a court of one state exercising equity powers should compel B to execute a deed of the land to A, this deed would pass title to A, and would be entitled to respect in the courts of the other state. This is because a court having jurisdiction of a person may compel him to do something concerning a thing beyond the control of the court.²³ On the other hand, the personal obligations of persons follow them wherever they go, regardless of where they live, where the obligation was contracted, or where it is payable. Therefore, if A and B live in Chicago, and there B makes A a promise for value to pay A money there, and later A sues B in New York on that promise and recovers, or fails to recover judgment on it, that New York judgment is binding between both as to their rights on that matter; and the courts of Chicago and all other places are bound to respect it.²⁴

But to make a judgment binding as to a tangible thing in rem this res must be located within the court's territory and be a subject matter of the suit. A court may obtain jurisdiction to render judgment merely in rem without any process being personally served on the persons interested in the thing. For example, a court of probate may decree that such an

²³ *Penn v. Lord Baltimore*, 1 Ves. Sr. 444 (Eng.); *Lindley v. O'Reilly*, 1 L. R. A. 79, 7 Am. St. Rep. 802.

²⁴ *Balk v. Harris*, 198 U. S. 215, 25 S. C. R. 625.

instrument is the will of the late John Smith without any notice personally served on the heirs of John Smith within the court's territory to appear and defend the suit. The title of the case and the papers in the cause need not even mention their names or suggest that they are interested in the proceeding. On the other hand, it is indispensable that some notice to them to appear and defend, or to all persons interested to defend, shall be given by publication or otherwise; and that notice must be reasonably adapted to reach them and bring them into court.²⁵

17. **Jurisdiction of the question.**—Since courts are created to decide controversies submitted to them for decision, they cannot decide what is not submitted; they can give only the relief prayed for. In so far as they attempt or purport to do more, their judgments are absolutely void. This principle may well be illustrated by a case before the Supreme Court of the United States. Hope Life Insurance Company deposited funds with the New York commissioner of insurance to secure payment of its policies, and later reinsured its liabilities in the Mutual Life Insurance Company of New Jersey. Afterward Joel Parker was appointed by the Chancery Court of New Jersey receiver of the latter company, and later was appointed ancillary receiver by the Supreme Court of New York for its affairs in New York. Reynolds and others brought suit in the Supreme Court of New York to determine who was entitled to the funds deposited with the New York

²⁵ Tyler v. Judges, 175 Mass. 71, 51 L. R. A. 433; Roller v. Holly, 176 U. S. 398.

commissioner of insurance. Before a decree was entered Parker was removed in New Jersey and Stockton appointed, by the Court of Chancery of New Jersey, as receiver in his stead.

Without further amendment of the pleadings the Supreme Court of New York later entered a decree that Reynolds and his associates recover \$1,010,496 of Parker as receiver of the New Jersey Mutual Life Insurance Company; and Stockton having refused to make payment, the Court of Chancery of New Jersey was moved to order him to do so. This the court refused to do, because the decree for payment of this money in a suit to determine who was entitled to the funds on deposit with the New York commissioner of insurance was not responsive to the pleadings, was therefore void, and was entitled to no respect in New Jersey. The order so rendered was sustained by the Supreme Court of the United States, from whose opinion the following is quoted:

18. **Same subject—Opinion quoted.**—"Given a court of general jurisdiction in ejectment as well as in replevin, a complaint in replevin for the possession of certain specific property, personal service upon the defendant, appearance and answer denying title; could (there being no subsequent appearance of the defendant and no amendment of the complaint) a judgment thereafter rendered in such action for the recovery of the possession of certain real estate be upheld? Surely not, even in the courts of the same state. If not there, the constitutional provision quoted gives no greater force to the same record in another state.

“We are not concerned in this case as to the power of amendment of pleadings lodged in the trial court, or the effect of any amendment made under such power, for no amendment was made or asked. And without amendment of the pleadings, a judgment for the recovery of the possession of real estate, entered in an action whose pleadings disclose only a claim for the possession of personal property, cannot be sustained, although personal service was made upon the defendant. The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is, that a judgment, to be conclusive upon the parties to the litigation, must be responsive to the matter controverted. Nor are we concerned with the question as to the rule which obtains in a case in which, while the matter determined was not in fact put in issue by the pleadings, it is apparent from the record that the defeated party was present at the trial and actually litigated that matter. In such a case the proposition so often affirmed, that that is to be considered as done which ought to have been done, may have weight, and the amendment which ought to have been made to conform the pleadings to the evidence may be treated as having been made. Here there was no appearance after the filing of the answer, and no participation in the trial or other proceedings. Whatever may be the rule where substantial amendments to the complaint are permitted and made, and the defendant responds thereto, or where it appears that he takes actual part in the litigation of the mat-

ters determined, the rule is universal that where he appears and responds only to the complaint as filed, and no amendment is made thereto, the judgment is conclusive only so far as it determines matters which by the pleadings are put in issue. And this rule, which determines the conclusiveness of a judgment rendered in one court of a state, as to all subsequent inquiries in the courts of the same state, enters into and limits the constitutional provision quoted, as to the full faith and credit which must be given in one state to judgments rendered in the courts of another state.”²⁶

19. **Same subject—Another case.**—The court then proceeded to quote with approval the language of the Court of Appeals of New Jersey in the leading case of *Munday v. Vail*,²⁷ in which a decree declaring a deed wholly void on a prayer by a judgment creditor that it should be decreed void as to him, was held void in so far as it exceeded the prayer, as follows: “A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and B are parties to a suit, a court can decide any matter in which they are interested whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is

²⁶ *Reynolds v. Stockton*, 140 U. S. 254, 11 S. C. R. 773.

²⁷ 34 N. J. L. 418.

only over these particular interests, which they choose to draw in question, that a power of judicial decision arises." And again: "A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated."

From these cases it will be seen that the test to determine whether the court had jurisdiction of the question is to read the prayer for relief and see whether it prays for the relief granted. In so far as that relief is prayed for, the pleadings give the court jurisdiction to decide it. It is no answer to say that there are no facts alleged which show or even tend to show that the party was entitled to such relief. It is enough that he has asked for it. If so the court is bound to decide whether he is entitled to it; and if in deciding this question the court falls into error it is error merely. But if the court steps outside of the pleadings and assumes to decide matters and grant relief not prayed for, merely because the party seems entitled to it, the judgment is void as to such excess.

20. **That procedure is jurisdictional.**—It is believed that the six essentials above discussed are all the elements of jurisdiction. But there remains one more topic to discuss. There are many decisions to the effect that when a certain procedure is prescribed to be pursued in an action either of common law or

statutory origin, obedience to all the requirements of such statute is essential to the validity of the judgment in such action. There is very little to be said in favor of this view; and it is believed that the great mass of decisions to this effect can be traced to two or three causes: (1) the failure of the attorneys and judges engaged in the case to appreciate the question and the effect of the decision; (2) the attempt of a court to save an unfortunate from a hard case, which often makes bad law; and (3) the blind following of prior cases produced in such instances as above referred to.

But let us see what can be and has been said in favor of this view. Assume that the legislature has provided a new remedy to attach or garnish effects of debtors and appropriate to payment of their debts, to sell land of infants for their support, to dispose of land of deceased persons to pay their debts, to take property for a street or other public use, to pay for a public ditch, or the like; and in doing this the legislature has provided suitable machinery by various steps to carry the plan into effect, a dozen or a thousand things are required to be done; it is said that the only authority for the proceeding is the statute, and if that is not followed there is no authority at all, the statute is imperative, mandatory, and must be obeyed.

For example, it is provided that property of the defendant may be attached if the plaintiff shall make affidavit of the amount of his claim, that it is due on contract, that the defendant is about to abscond, dispose of his property to defraud creditors, or the

Like, and that plaintiff is apprehensive of losing his claim unless the property is attached. An attempt to follow the statute is made, the property is taken and sold, it is later discovered that by some slip some requirement of the statute was not obeyed; the debtor replevins his property from the purchaser, and the court holds the sale void because the requirements of the statute were not observed.

21. **Procedure not jurisdictional.**—The fallacy of the foregoing argument is plain and manifest. As to the statement that the law is imperative, and there is no authority to proceed without obeying the law, it might with equal truth be said that there is no authority for rendering judgment against one for more than he owes, or without proper proof of his indebtedness, or without pleadings showing a cause of action against him; but no one thinks a judgment would be void because the judge erred in receiving improper testimony, overruling a proper defense, sustaining a defective complaint, or holding the demand proved when he should rule that the evidence was insufficient. The erroneous judgment is binding unless and until reversed on appeal or the like. It is for the judge trying the case to say whether the procedure is sufficient or not, and if a defendant in whose favor a provision is made fails to insist on observance of it he waives his right. The judgment of the court in rendering judgment sustaining the proceeding includes of necessity an adjudication that the procedure is sufficient, and to permit argument of the question without vacating the judgment is unwarrantably disregarding the bar which the judg-

ment produces. So much for the logic of the case; but the considerations of public policy are much stronger. It is not once in a thousand times that the omission has in the slightest prejudiced the party carping at the judgment and seeking to avoid it collaterally. To enable him to avail himself of the technicality is an inducement to him not to object in the first suit if he knows of a departure, but to save the defect for future use to defeat the judgment after he has been beaten on the merits. If that rule is followed the legislature must be held to have defeated its own object of protecting all parties concerned and producing the best price at a forced sale; instead of providing numerous safeguards, to have laid numerous traps and snares to catch the unwary. Intending bidders are frightened away, there being so many chances that they may not get good title to one that they will; wherefore the property must be sacrificed instead of bringing the best price, and that when money is most needed. The public who have been told courts are places for jugglery, not for justice, and are inclined to believe it, see a demonstration of the statement in the disrespect of courts for each other's prior judgments.

CHAPTER II.

THE RECORD.

22. **Nature.**—The record is the official history of the proceedings in a cause, prepared by the court or some of its officials as a perpetual memorial of what was done, and in strictness it is said not to include all the papers but only the original writ, summons and other process to get the defendant into court, declaration or complaint of the plaintiff, answer or plea by the defendant, replication, rejoinder, rebutter, surrebutter, or other pleadings on either side to get to an issue, impaneling and verdict of the jury, the judgment of the court thereon, and executions to put such judgment into effect. But if it be desired to get other matters into the record for any purpose, such as to get the fact before another court for review, testimony taken and other matters may be incorporated into the record by the court, as by settling a bill of exceptions.

23. **Entry of the record.**—In theory of law the entry is to be made at once as the fact occurs so far as it pertains to what is done in open court, and that is why a recorder or clerk is to attend the court in all its sittings. But if any entry is not made when it should be, it is no less the right of the parties and the duty of the court to have the entry truly made so that the record may furnish a true and complete history. If the neglect is discovered, even years aft-

erwards, the court may and should cause the entry to be then made. For this purpose it is not essential that any notice should be given to any of the parties, though notice should properly be given, that the parties may show if they can to the satisfaction of the court any modifying facts. Notice is not jurisdictional to making the entry because it is the court making up its own memorial. Its attention may be called to the neglect by a party or a stranger, or by the judge's own discovery, whereupon the judge may order the entry made without further notice or ceremony.

24. **Same subject—Example.**—For example, fourteen years after judgment in a cause it was discovered by a stranger that no entry of that fact had been made on the record, whereupon the judge ordered entry to be made at once, which was done. When this record was offered in evidence in another case it was objected that the entry was made by the court without sufficient evidence and written memoranda on which to make it, that it was made at the suggestion of a stranger, that the party against whom it was offered was not notified of the proposed entry before it was made, and that the clerk had no power at so remote a day to make any entry at all. All these objections were overruled; and the court said: "There can be no doubt that it is competent for a court of record under its general inherent and necessary authority to correct the mistakes and supply the defects of its clerk or recording officer, so as to have the record conform to the actual facts and truth of the case, and that this may be done at any time, as well

after as during the term, *nunc pro tunc* (now for then). The length of time in this case, between granting the license and making up the record, does not take away the right or jurisdiction of the court. The authorities upon this point are numerous and conclusive. This was not a case of want of jurisdiction, in which the record cannot be amended, because, there being an omission to act, there is nothing to record; in such case, the defect is not in the record, but in the action of the court. It was further said in argument that there was not sufficient material from which to make up the record. But the court of common pleas, having the exclusive right and jurisdiction in the matter, were the proper judges of the necessity and propriety of extending the record, and of the proofs and of the sufficiency of the proofs upon which to proceed. Such a record, when made up, is conclusive until altered or set aside by the same or some other court having jurisdiction; but it cannot be drawn in question collaterally when such record is used or relied upon in support of a title. It was further said that the extended record was invalid, because made without notice. But this was not a case for notice. Surely a court of record need not give notice to all the world to come in and show cause why it should not make its record conform to the truth of the case."²⁸ This power is not dependent on statute, and may be exercised in term time or vacation, by the same judge or his successor, and even after the death of the parties.

25. Conclusiveness of the record.—The record,

²⁸ Balch v. Shaw, 61 Mass. 282.

being made for the purpose of preserving the history of the matter, is more likely to be correct than the memory of casual bystanders or even parties to the case, and much less liable to prejudice and bias; wherefore in all other courts it is the only fit and appropriate evidence of what occurred. It can neither be added to nor contradicted in any proceeding in which it becomes material to inquire what happened in the case, and no other evidence is competent to prove the facts. Such is the general rule. But in a proceeding, civil or criminal, against the officer making the record, charging that he willfully or fraudulently made a false entry, other evidence of the true facts may be given; for otherwise it would be impossible to convict or recover damages for the wrongful act. Likewise, in a proceeding, in the court whose record it is, to have a false entry erased and a true entry made in its place, the court may receive any evidence outside of the record it desires, to refresh its recollection and enable it to make a true record. When an officer makes an entry as of fact which he can learn only by hearsay, as that the person on whom he served the process was president of the company, this fact is open to other proof.

The party prejudiced by the false record offered in evidence against him can easily get redress by going to the court whose record it is, having the false entry erased or corrected, and obtaining a new transcript. Not so if it is a judgment of a court of another country. It is the state's duty to protect its citizens. It never sends them to a foreign state or country for justice. When a foreign judgment, or

a judgment from another state, is offered in evidence, it is always competent to show by extrinsic evidence that the court assuming to render it had no jurisdiction, even in contradiction of express allegations of fact on such jurisdictional point contained in the record so offered in evidence. If the record states that the defendant was personally served, he may show by his own testimony that he was not notified at all. If the record states that he appeared and defended, he may show that he did not appear.²⁹

²⁹ *Ferguson v. Crawford*, 70 N. Y. 253, 26 Am. Rep. 589.

CHAPTER III.

EFFECT OF A JUDGMENT AS A BAR.

26. **Why a bar.**—The purpose of suit is to establish the right and have redress for the wrong; and in order to accomplish this purpose it is necessary that when by due trial the right is established, and judgment rendered accordingly, the parties shall forever be concluded thereby to say the contrary. The judgment is a finality as to the cause of action sued on and the whole of it, as to every ground of recovery and every possible defense, whether such ground of recovery was urged or not, whether or not such defense was pleaded or urged, whether the plaintiff sought to recover the whole amount or not. This idea is elaborated in the following paragraphs:

27. **Amending and modifying judgments.**—It is a general rule of law that all judgments, decrees, or other orders of courts having terms and vacations are under the control of the court which pronounced them during the whole term at which they are pronounced; and that no matter how conclusive and final in form, they may be vacated, modified, or annulled by the court of its own motion, or on the motion of anyone. But it is a rule equally well established that after the term is ended all final judgments pass beyond the control of the court, unless steps are taken during such term to vacate, modify, or amend them, and such motion is carried over to the next

term as unfinished business. To this general rule certain exceptions have crept into practice; but the circumstances in which such relief will be given differ in the several states, and it is probable that the line is not very distinctly drawn in many states.

At the old common law relief might be had after the term in a great variety of cases by a new action; for example, attain, if the jury had found a corrupt verdict; *audita querela* (hear the question), if a defense arose after judgment rendered; writ of error to correct some mistake of law appearing on the face of the record, etc.; but at the present time relief of this sort is given in most states on simple motion addressed to the discretion of the court pronouncing the judgment. To some extent this change is due to statute; to some extent to the more liberal attitude of the courts of today. But it is a matter of necessity that some limit be put beyond which the court shall not interfere to revise its judgments; else the uncertainty and insecurity of the judgment, due to the vacillating character of the court, might be more intolerable than no judgment at all. Therefore, courts are generally unable to vacate their judgments or modify them after the term at which they are rendered. It has been quite generally held that such inferior courts as justices of the peace have no power to vacate their judgments at all. As soon as such courts render their judgments they lose power to do anything further in the case except to supervise the enforcement of the judgment.

28. **Splitting the cause.**—If an injured party sues for part of his damage he can never recover for the

rest in another suit after judgment in the first action, whether that judgment was in his favor or not. For example, a man crossing a railway was negligently struck by a passing railway train, his horses killed, his wagon demolished, and himself seriously injured. He sued and had judgment for the injury to his horses and wagon, and later sued for the injury to his person. The defendant urged that there was but one cause of action, one wrong, and one injury, and that he had once had judgment thereon, wherefore he was barred from further recovery. The plaintiff did not deny the main contention, it was too fundamental to debate; but the plaintiff said that there were two causes of action, one for the injury to his property and one for the injury to his person. On this last point the courts are not agreed; but this particular court held that there was but one cause of action, and from this conclusion it followed of necessity that no further recovery could be had.³⁰

29. Splitting the grounds of recovery and defense.—Parties cannot try their actions on the installment plan. All grounds of recovery not urged are as completely barred as if urged and denied. A receiver for an insolvent estate sued to set aside a deed by the insolvent to his son and a mortgage by the son to alleged creditors of the insolvent, urging that the deed was without consideration and the mortgage a fraudulent preference. Judgment was given for the defendants. Later the receiver brought another action, alleging that the son was a creditor of the father and the deed a fraudulent preference. The

³⁰ King v. Chicago, M. & St. P. Ry. Co., 80 Minn. 83, 82 N. W. 1113.

court pointed out that the primary right in both cases was the same, to have the land; and the defendant's primary duty was the same, to give it up. It is true the basis of the primary right in one case is different from that in the other, but that is a mere difference in the ground of recovery, not a different cause of action. If a ground of recovery or defense not urged were not barred, the same case might be retried as often as a new ground of recovery or defense could be invented.³¹

The United States prosecuted a suit to avoid a patent and failed. Later it instituted another suit to recover the same land on a different ground. The first suit was held to be a bar to the second. The court said: "Formerly it was sought to avoid the patents by way of forfeiture. Now it seeks the same conclusion by a different means; that is to say, by evidence that the lands originally were excepted from the grant. But in this as in the former suit it seeks to establish its own title to the fee. It may be the law of Scotland that a judgment is not a bar to a second attempt to reach the same result by a different *medium concludendi* (method of demonstration).

* * * But the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim; and *a fortiori* (with stronger reason), he cannot divide the grounds of recovery."³² Likewise the defendant must make his whole defense when sued. If he has several defenses and brings

³¹ Patterson v. Wold, 33 Fed. 791.

³² United States v. California Land & O. Co., 192 U. S. 355, 24 S. C. R. 266.

forward all, all are concluded by judgment for plaintiff. If he has several and urges only part of them, the others are equally concluded by the judgment.

30. **Cross-claims.**—If the defendant has counterclaims constituting a cause or causes of action in his favor he may set them up in the plaintiff's action or bring an action of his own. The only result of his failure to set them up as counterclaims in the original suit is that usually the statute imposes the costs on him as a result of the expense imposed on the opposite party of prosecuting or defending two suits instead of one. But if counterclaims are set up, the same rule applies to them as to the plaintiff's cause of action; the judgment absolutely bars them. If allowed to any extent, the judgment is proof that nothing further is due. If the defendant only claims part of his single counterclaim, the rest is waived, and can never be recovered or set up as cross-demand or defense in any subsequent suit.

31. **Fraud.**—That the opposite party in the prior suit succeeded by means of fraud practiced on the court or defeated party is reason for vacating the judgment so procured; but till so vacated the judgment is as binding on him as if obtained by the most fair means. It is each party's business to see that his side of the case is properly presented to the court, and if the effect of the judgment could be avoided collaterally by allegation of fraud, such an allegation would be made in almost every case, and the beneficial effects of the law of bar by judgment would be destroyed.³³

³³ Bleakley v. Barclay, 75 Kan. 462, 89 Pac. 906.

32. **Judgments not on the merits.**—If a suit is dismissed because the plaintiff fails to prosecute, or for some other reason not going to the merits of his demand, such judgment does not prevent him subsequently prosecuting a new suit for the same cause. For example, if the judgment went for the defendant because the plaintiff sued before the cause of action matured, sued in the wrong form of action, sued in the wrong court, failed to join proper parties plaintiff or defendant, or the like, such judgment will not prevent him prosecuting a new action after the cause of action matures, in the proper court and form of action, by and against the proper parties. But in this connection it is important to distinguish between a mere non-suit, and a retraxit. If the suit is dismissed merely from default of the plaintiff, he may sue again on proper terms, paying the costs of the former suit, or the like; but if he withdraws his claim, that amounts to an abandonment; and judgment entered thereon is on the merits and a complete bar to any further suit on the same cause.³⁴

If the record of the former suit offered in evidence as a bar to a new action does not show the ground on which the suit proceeded, oral testimony may be introduced to show that it is no bar, because dismissed for one of the reasons above mentioned. For example, judgment for defendant in a former action for the same cause was pleaded in defense of an action for money; and the plaintiff was permitted over the defendant's objection to prove by parol that the judgment in the former case was rendered because

³⁴ *United States v. Parker*, 120 U. S. 89.

the action was prematurely brought and for that reason alone, though the only plea of record was a general denial. On error the Supreme Court held such proof competent.³⁵ To suit on a bond, judgment for defendant in an action on a coupon on the same bond was pleaded in estoppel. Plaintiff was permitted to show by parol that judgment in the first suit was for defendant because he relied on a presumption of bona fides from purchasing before maturity, whereas he now offered to prove it by positive testimony. It is believed this is an extreme case, but the court admitted the defense on this proof. (Cromwell v. County of Sac, 94 U. S. 351.)

³⁵ Waterhouse v. Levine, 182 Mass. 407, 65 N. E. 822.

CHAPTER IV.

JUDGMENTS AS ESTOPPELS.

33. **Distinguished from bar.**—The bar of a judgment extends only to conclude the parties from prosecuting any further action for the same cause, or interposing any defenses to a judgment which might have been interposed at the trial on which it was rendered. But the judgment is conclusive between the parties, not only as to the same cause but if brought in question in any subsequent action for any cause. It bars further action on the same cause, and it stops the parties from contending the contrary as to the facts determined, in any cause whatever. The judgment is a bar to every defense made or which might have been made.

It is an estoppel only as to the point actually litigated, certainly and necessarily determined. For example, if A sells B a horse, B giving two notes for \$100 each, for the price, one maturing in six months, the other in a year; and when the first note matures A sues B on it and B defends that the horse was warranted to be sound but in fact was not, wherefore it was not worth the price, and plaintiff ought not to recover, judgment for the plaintiff on this note prevents the defendant ever urging any defense to that demand, whether he made such defense or not. But when the plaintiff subsequently sues on the other cause of action represented by the other note, the

defendant may make any defense except the one found against him in the first suit. He will not be permitted to urge that the horse was not sound, but he may plead that the plaintiff did not own it, wherefore there was no consideration for the promise, or that the plaintiff was guilty of fraud in procuring the sale, wherefore defendant repudiated the contract.

34. Essentials of an estoppel.—To create an estoppel by judgment it is essential: that the parties to the two actions be the same; that the point raised in the second action was actually litigated in the prior suit; that it was certainly and necessarily decided; that the two actions depend on the same law; and that the court that tried the first action might try the last. The few peculiar instances in which judgments bind strangers, and the rule that one who succeeds to a party is equally bound as the party would have been, will be considered later; but at present let us consider the several essentials above mentioned separately.

35. Parties estopped.—Ordinarily no person is bound by a judgment who was not a party to the suit. By party we do not mean one whose name appears in the title or record of the case. One not named may be a party, and one named may not be a party. If an assignee of a demand sues in the name of the assignor, he is bound by the judgment and the assignor is not bound. The reason is that the assignee only has the right to control the prosecution. That right is what makes one a party or not. In the great leading case of *The Duchess of Kingston*,³⁶ we find an

³⁶ Howell's State Trials No. 551, Smith's Leading Cases *424.

excellent statement and illustration of the rule. The Duchess of Kingston was indicted for bigamy, and she sought to estop the crown from asserting the existence of the first marriage by proof of a suit by her against the former alleged husband in the consistory court of the bishop of London, charging him with slandering her by alleging that they were married; in this suit he had appeared and affirmed his claim, and on the trial he was found guilty of slander and ordered to stop his accusation. This judgment was held not competent proof, and no estoppel, because the crown now prosecuting this suit was not a party to that action. The following quotation has become a classic:

Chief Justice DeGray, in giving the unanimous opinion of the judges, said: "What has been said at the bar is certainly true as a general principle, that a transaction between two parties in judicial proceedings ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defense, or to examine witnesses, or to appeal from a judgment he might think erroneous; and therefore the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon facts found, although evidence against the parties and all claiming under them, are not in general to be used to the prejudice of strangers. There are some exceptions to this general rule, founded upon particular reasons, but not being applicable to the present subject, it is unnecessary to state them."

36. **Estoppel extends only to points actually litigated.**—The reason why there is any conclusion of the parties at all beyond the cause of action actually disposed of in the prior case is, because it would be oppressive to a party to put him twice to the expense of establishing the same facts, and be unduly burdensome to the public (whose courts are run at great expense to enable citizens to settle their rights) to permit its time and funds to be consumed in a retrial of points already concluded by a final judgment between the same parties. But if the doctrine were carried beyond this, it would tend rather to contention than to quiet. It would make every trial a trap for the unwary, if every person suing or sued on any demand were bound at his peril to raise and litigate every possible question material to the case, at the peril of being estopped in every subsequent action on a different cause against the same party, though it might be impossible to foresee the bearing this fact might have on the future rights of the parties. It would be a harsh and oppressive rule which would make it necessary for one sued on a trifling claim to resist it and engage in costly litigation in order to prevent the operation of a judgment which would be held conclusively to have established against him every material fact alleged and not denied and disproved, so as to prevent him showing the truth if another controversy should arise between the same parties. There might be various reasons why he would prefer to submit to a claim rather than defend against it. The plaintiff cannot justly complain that the defendant has not seen fit to make defenses and

raise issues for the purpose of laying the ground or clearing the way for future litigation. A prior judgment between the same parties awarding separate maintenance for cause was pleaded as an estoppel to an action for divorce on the ground of adultery, the alleged adultery being committed before the trial of the previous action; but the court held there was no estoppel created thereby, the adultery not being urged in defense of the first action.³⁷ If a judgment for the plaintiff is rendered by default, it is as conclusive in the plaintiff's favor as to the cause of action sued on as if it had been bitterly contested; it is an absolute bar. But since no defense was made, there is no estoppel thereby as to any fact whatever. The original cause of action is concluded, but nothing else is.

37. Estoppel only as to points certainly and necessarily decided.—It is not enough that the point was actually litigated. It must appear also that the point was in fact decided, and was material to the judgment. An action was prosecuted on a declaration containing three counts, only one of which stated a cause of action, and that for malice. The case went to the jury on all three counts, and a general verdict was rendered for the plaintiff. On the judgment rendered thereon execution against the body of the defendant was issued, and he was imprisoned. On judgments for malicious injuries such executions were allowed by law. The defendant moved to be discharged, and offered to show absence of malice. The plaintiff objected to such proofs, contending that

³⁷ *Watts v. Watts*, 160 Mass. 464, 36 N. E. 479.

the judgment estopped the defendant to deny malice. The court held otherwise. If the defendant had moved in arrest of judgment on the ground that no cause of action was stated in either of the first two counts, and that it did not appear on which the jury based their verdict, the motion would have been denied, based on a presumption indulged in favor of the plaintiff that the verdict must have been on the good count; but for the purpose of estoppel no such presumption can be indulged.³⁸

38. Two actions depending on different law.—A judgment on verdict found on a preponderance of proof ought not to be an estoppel in an action requiring proof beyond a reasonable doubt. A judgment based on wager of law ought not to estop in a case in which law could not be waged. To permit this would in effect be permitting wager of law in the other case also. This point is well expounded in the opinion in the case of *The Duchess of Kingston*,³⁹ before mentioned: “If a man should be indicted for taking a woman by force and marrying her, or for marrying a child without her father’s consent, or for a rape where the defense is that the woman is his wife—in all these cases the temporal courts are bound to try the prisoner by the rules and course of the common law, and incidentally to determine what is heretical, and what is blasphemous, and whether it was a marriage within the statute, a marriage without consent. * * * And if the rule of evidence must be, as it is often declared to be, reciprocal, and

³⁸ *Kitson v. Farwell*, 132 Ill. 327, 23 N. E. 1024.

³⁹ *Howell’s State Trials* No. 551; *Smith’s Leading Cases* *424.

that in all cases in which sentences favorable to the prisoner are to be admitted as conclusive evidence for him, the sentences, if unfavorable to the prisoner, are in like manner conclusive evidence against him; in what situation must the prisoner be whose life, or liberty, or property, or fame, rests on the judgments of courts which have no jurisdiction over them in the predicament in which they stand? And in what situation are the judges of the common law, who must condemn on the word of an ecclesiastical judge, without exercising any judgment of their own? * * * If, therefore, such a sentence, even upon a matter within their jurisdiction, and before a felony committed, should be conclusive evidence on a trial for felony committed after, the opinion of a judge, incompetent for the purpose, resulting (for aught that appears) from incompetent proofs (as suppose the suppletory oath), will direct or rule a jury and a court of competent jurisdiction without confronting any witnesses, or hearing any proofs. * * * The difficulty will not be removed by presuming that every court determines rightly; * * * if they did, still the court will have determined rightly by ecclesiastical laws and rules, and not by those laws and rules by which criminals are to stand or fall in this country."

39. If the court that tried the first case could not try the last one.—What is said in the preceding section indicates that there is no estoppel by a judgment unless the court that rendered it could have tried the case in which such judgment is set up as an estoppel. This is a rule of necessity, based on

the highest considerations. If it were not so, a judgment of an inferior court might be invoked to control the determination of a case in a superior court in a matter which the inferior court could by no means try. It would in effect determine the matter by the judgment of a court having no jurisdiction. Every sovereign state has the right to determine who shall own the land within its borders, and for the purpose of determining this judicially the exclusive jurisdiction is vested in the courts of the state; but if these courts were bound to enter up the judgments of courts of foreign states or countries who may have obtained jurisdiction of the parties and rendered judgments binding on them in personam, then the effective jurisdiction is taken from these courts and vested in the courts of the foreign states. Such is not the law.

Take another illustration. A doctor was sued for damages for malpractice. He immediately sued in justice court for his services, and obtained judgment. This judgment he pleaded as an estoppel to the action for damages. The court surmised that the suit for services was prosecuted merely for the purpose of obtaining an estoppel to plead in the higher court; but, waiving this, the court considered the practical aspect of the matter: if the person injured had urged his cause as a counterclaim in the justice court, the amount he could recover in any event would have been limited to \$100, the limit of the justice's jurisdiction, and an amount wholly inadequate.⁴⁰

⁴⁰ *Jordahl v. Berry*, 72 Minn. 119, 75 N. W. 10, disapproving the decision of the court of appeals of New York to the contrary in *Dunham v. Bower*, 77 N. Y. 76, 33 Am. Rep. 570.

40. **Judgments bar and estop privies.**—One is privy to a judgment when he derives his right in the matter through a party, either directly or indirectly. If the judgment did not bind one obtaining his rights through a party, the effect of all judgments, both as to bar and estoppel, could be avoided by merely assigning the right to another, who would claim free from the bar or estoppel. In an early case, one sued for trespass to his land, and the defendant said in defense that the plaintiff was his villein, wherefore he had no right to sue; on the trial plaintiff was found free, and given judgment. Later title to the manor passed to another, who also committed trespass, and the plaintiff sued him, and he defended that the plaintiff was his villein, to which plaintiff pleaded the former judgment in estoppel. The defendant sought to avoid the effect of the estoppel by showing that he was not a party to the prior action; but he was held bound, because, as was said by Paston, J., otherwise each who is in such case after this that his villein is found free may make a feoffment, and the feoffee would not be estopped to claim him that was found free as his villein.⁴¹

One distinction between privies to the bar and privies to the estoppel of judgments is to be carefully observed. Anyone who acquires rights in the subject matter of the action after suit commenced and process served on his assignor is privy to and barred by the judgment; but one who acquires other causes of action from a party pending suit is not estopped by the judgment afterwards rendered in

⁴¹ John Broke's Case, 9 Hen. 6, pl. 67.

the prior action for a different cause. The reasons for this distinction are imperative. If one acquiring rights in the same cause of action after suit brought were not bound by the judgment, it would be impossible ever to bring the matter to a close if the defendant desired to avoid such result, for he could assign as soon as sued. On the other hand, business would be greatly embarrassed if all assignees were at the peril of being estopped as to any point which their assignor and any other person might afterwards choose to litigate in any action pending at the time of the transfer. As to the cause of action sued on, it may be seen in advance that all grounds of recovery and defense will be concluded by the judgment; but no man can tell what points they may elect to try. All are estopped who buy after judgment; all are barred who buy after suit begun.

41. **Judgments binding strangers.**—While it is generally true that strangers to an action are neither bound nor benefited by any determination therein, there are certain well-established exceptions, based on reason and public policy. Courts are required by law to keep records of their doings, as a perpetual memorial thereof; and whenever it afterwards becomes material to inquire what transpired at any session of the court, whether the question arises between the parties or between strangers, it is reason that the court's official records should be proof of such facts; it is more probable that the records will show the truth than that the casual memory of bystanders should be correct. Again, whenever a fact may be established by proof of general reputation,

such as custom, prescription, pedigree, or the like, the record of a judgment or decree finding such fact is prima facie evidence of that fact even against strangers to that suit. The solemn adjudication of a court upon testimony is justly regarded as stronger proof of the fact than mere evidence of general reputation. Again, debtors do not lose their rights to do business with others by mere reason of contracting a debt with one. A judgment obtained against a debtor by one creditor is conclusive against all other creditors, though strangers to the suit, unless obtained by collusion: (1) because it is conclusive between the parties to the case, who have the exclusive right to try it; (2) because the claims of other creditors to the property are through the debtor, and subject to all prior liens and conveyances in good faith. Neither a creditor nor a stranger can interfere in a bona fide litigation of the debtor, nor retry his cause for him, nor question the effect of the judgment as a claim upon his estate. Where, however, fraud is established, the creditor does not claim through the debtor but adversely to him, and by title paramount, which overreaches and annuls the fraudulent conveyance or judgment, by which the debtor himself would be estopped.⁴²

It is a matter of public necessity that someone should always have power to deal with all property. If future estates in property are settled on persons yet unborn, and for some reason it becomes necessary to deal with the property, the court of chancery, on suggestion by any friend of the court, especially by

⁴² Pabst Brewing Co. v. Jensen, 68 Minn. 293, 71 N. W. 384.

one interested in the persons unborn or in the property, and on bill filed bringing all known living persons having interests in the property into court, will appoint someone to represent the unborn and make such decree as is necessary to preserve the property, make it productive, or otherwise serve the purposes of the settlor; and when those to whom such future interest will belong are born, they will be held bound by such decree.⁴³

42. Same subject—Judgments in rem.—It is sometimes contended that the rules heretofore discussed do not apply to judgments in rem, and that both parties and strangers are concluded by such decrees. This is a mistake. There is no estoppel by a judgment in rem against anyone not a party more than in the case of a judgment in personam; and the bar of the judgment differs from a judgment in personam only as the judgment in its purpose and nature so differs. In an action to set aside a mortgage executed by plaintiff's testator defendant invoked the decree of the probate court admitting the will to probate as an adjudication that the deceased was not insane, the ground on which it was sought to have the mortgage vacated; and he argued that since the action of the court in probating the will was in rem all persons, whether parties to the proceeding or not, are bound and benefited by the decree.

This defense and evidence were excluded, and in sustaining this ruling, Holmes, J., speaking for the court, said: "A judgment in rem is an act of the sovereign power; and, as such, its effect cannot be

⁴³ Mayall v. Mayall, 63 Minn. 511, 65 N. W. 942, and cases cited.

disputed, at least within the jurisdiction. If a competent court declares a vessel forfeited, or orders it sold free from all claims, or divorces a couple, or establishes a will under a statute, * * * a paramount title is passed, the couple is divorced, the will is established, as against all the world, whether parties or not, because the sovereign has said that it shall be so. Also the same is true when a judgment is that A recover a debt from B, and no one within the jurisdiction can oppose it. But it does not follow in the former case any more than in the latter, nor is it true, that the judgment, because conclusive on all the world in what we may call its legislative effect, is equally conclusive upon all as an adjudication of the facts upon which it is grounded. On the contrary, those judgments, such as sentences of prize courts, to which the greatest effect has been given in collateral proceedings, are said to be conclusive evidence of the facts upon which they proceed only against parties who were entitled to be heard before they are rendered.”⁴⁴

⁴⁴ *Brigham v. Fayerweather*, 140 Mass. 411, 5 N. E. 265.

EXECUTIONS

CHAPTER V.

NATURE AND EFFECT OF EXECUTIONS.

43. **In general.**—The execution is the life of the law. Without the power to execute, the power to adjudge is vain. Therefore the power to adjudge is held to imply the power to enforce. Every court having power to adjudge is held to have the implied power to issue execution on its judgments to put them into effect. There are, indeed, some judgments that need no execution, such as those which declare the existing state of things to be the proper state; for example, judgment in favor of the defendant of no cause of action, or quieting title to land in the complainant who was already in possession. But ordinarily judgments have to be put into effect by execution. An execution is a process issued by the court rendering a judgment, addressed to the sheriff or other proper ministerial officer of the jurisdiction where the court sits, reciting the names of the parties, the nature of the action and judgment, and ordering such officer to put the judgment into effect, signed by the clerk of the court, and authenticated by its seal.

44. **Kinds of execution.**—The execution ought to be appropriate to the judgment to be enforced. The

judgment may decree that the plaintiff is entitled to keep what he has or is not entitled to receive what he asks, in which no execution is necessary, or that the defendant do or refrain from doing some act, or that the plaintiff recover a specific chattel, specific land, or a sum in money, or any combination of these. Therefore, the execution should be that the sheriff put the plaintiff in possession, that the sheriff make the sum awarded from the goods and land of the defendant, or that he take and imprison the defendant till he do the thing commanded of him, or the like. For the purposes which have been enumerated the most common forms of execution are the *fieri facias* and the *capias*.

At the common law a *fieri facias* was a writ issuing from the court that rendered the judgment, directed to the sheriff of the county and commanding him to seize and sell sufficient of the goods and chattels of the defendant to make the amount of the judgment and costs, and to have the money in court by a day named. By statute the sheriff is also authorized under such a writ to sell land belonging to the defendant.

45. **Same subject—Capias.**—The *capias* may be used either as process, *capias ad respondendum*, or as execution, *capias ad satisfaciendum*; and as execution it commands the sheriff to take the defendant and hold him in safe and secure custody till he shall satisfy the judgment. At the oldest common law this execution could only be used to enforce judgments recovered for wrongs accomplished by force or for dues to the king; but by degrees it was extended

till it was commonly used in all actions. The oppression of poor debtors by greedy creditors finally induced statutes and constitutional provisions abolishing the use of this writ for the recovery of simple honest debts; but it is still available to enforce payment of judgments recovered for money due for torts, such as assault and battery, slander, and malicious injuries, or for contract obligations incurred by breach of trust, misconduct in office, or fraud. Neither law nor public policy requires that the crook should be relieved from imprisonment for his wrong without satisfaction of the party injured. If the judgment is one for which such a writ is appropriate, the plaintiff may take it as a matter of course, without any special order of the court awarding it to him; but prudence commands that the judgment creditor get a special order for it instead of taking chances of the court afterward holding him liable for false imprisonment, on the ground that his judgment was not one on which such an execution should issue.⁴⁵

46. Issuing the writ.—Execution cannot be issued till the judgment is rendered, but it has often been held that execution issued after judgment pronounced and before making the entry of record is good. In other courts it has been said that there is no judgment till it is written out; and therefore the only safe way is to have the judgment entered of record before taking execution. It has also been held that till the writ is in the hands of the sheriff it is not issued; wherefore taking the writ from the clerk duly signed and sealed and carrying it to a

⁴⁵ *Hormann v. Sherin*, 8 S. Dak. 36, 65 N. W. 434, 59 Am. St. 744.

remote place to be executed is not a violation of an order staying execution, the writ not being delivered to the sheriff till the time has expired.⁴⁶ On the other hand, execution issued after the year and a day allowed at common law, or after the judgment becomes dormant under the statute, is not void. Sale under it passes as good title as if issued in time. The defendant may prevent the sale by having the writ quashed, but no one else can complain.⁴⁷ However, there are statutes in most if not all of the states providing that after a certain time all right under a judgment shall be barred, and if no execution is taken within that time the sale would be void.

47. Same subject—Death.—The death of the defendant prevented execution at the common law; because, by the death, the property belonged to other persons, the goods to the representative, the land to the heir; but the execution was a lien from the day of its date, and death of the defendant after that time did not prevent a levy on the property; and the effect of the restriction was evaded by dating the execution back to the first day of the last preceding term of court, so as to antedate the death of the defendant.⁴⁸ This practice is no longer permitted, for the statutes now provide that the execution shall be a lien only from the time the sheriff receives it, which time he shall indorse on the back of it, or that it shall be a lien only from actual levy. At the present time, therefore, it is generally necessary to

⁴⁶ *Peterson v. Wayne Circuit Judge*, 108 Mich. 608, 66 N. W. 487.

⁴⁷ *Mariner v. Coon*, 16 Wis. 465.

⁴⁸ *Parsons v. Gill*, 1 L. Raym. 695 (Eng.).

prove the judgment as a claim against the estate and take payment along with other creditors in the probate court.

48. **Same subject—Who may issue.**—Only the court that rendered the judgment could issue execution to enforce it at the common law, and that is still so where not changed by statute. Power to another court to issue execution is not to be implied or understood from statutes providing that the judgment shall become a lien on land by filing a transcript of it in another court, nor from the provision that on filing such transcript garnishment or other proceedings may be taken on the judgment in such other court. Such statutes authorize nothing beyond what their terms specify. But where the statute does expressly provide that on filing such transcript, or the like, the judgment may be enforced by execution or other process issuing from the court in which the transcript is filed, the filing of the transcript terminates the power of the court that rendered the judgment to do any further act to enforce it, and any execution or garnishment from it after the transcript is filed in the other court is void.⁴⁹

49. **Same subject—Form.**—The statutes provide various requirements as to the form of the executions and other processes issued by courts—that they shall be addressed to the sheriff or other officer who is to execute them, be entitled in the court and cause, run “In the Name of the People of the State,” be attested in the name of the judge of the court, “Witness the Hon. John Coon, Circuit Judge,” bear the

⁴⁹ *Rahm v. Soper*, 28 Kan. 529.

seal of the court, be signed by the clerk, and the like. It is manifest that departures from these requirements are in practice various; and there is great confusion among the decisions as to whether the departure renders the process and sale under it void, or is mere ground for having the writ quashed on application before sale, or may be cured by amendment on such application. The only safe rule is to follow the statute to the letter, and if it has been departed from, ascertain from the decisions of the particular state to what extent such a departure affects the proceedings.

50. **Controlling execution of the writ.**—Every court from the highest to the lowest possesses power in the absence of statute to control the officer in his acts in executing its processes. This is a matter of necessity to prevent injustice. Execution was issued and put in the hands of the sheriff to collect. Later the judge, on motion of the defendant, without notice to the plaintiff or his attorney, ordered the sheriff to stay action till the first day of the next term of court. By that time all the property of the defendant had passed beyond the reach of execution. The creditor sued the sheriff to recover the amount of his judgment lost by the failure to execute; and claimed that the judge had no power to stop the writ without notice to the creditor, or if he had the sheriff was not protected by obeying the stay order without notifying the creditor. But the court held that it was the creditor's duty to take notice of what was done on his writ; and notwithstanding it was unwise, and bad practice, for the judge to stay the writ without

giving the opposite party a chance to be heard, still the order made without such notice was valid, and the sheriff was bound to obey it, under the pains and penalties of amercement, being liable individually and on his bond to the persons injured by his disobedience. The power to command includes the power to countermand.⁵⁰ It exists in all courts by necessary implication without statute.

Subject to the control of the court, the sheriff is bound to obey the orders of the judgment creditor as to what he does under the writ, so long as such orders are lawful. The creditor may specify what shall be taken, provided it is not exempt, fix the time and place of sale, so far as choice is left by the statute and the order of the court, or countermand the sale entirely if he desires to compromise with the debtor, and the sheriff is bound to obey such orders. He cannot proceed merely because he has incurred costs and fees which the creditor refuses to pay.⁵¹ If the judgment has been sold, the purchaser and not the original owner has the right to control, and the officer refuses to obey the purchaser at his peril, unless he expressly bases his refusal on lack of proof of the right of the purchaser to control.⁵²

51. Who may execute the writ.—The writ should be executed by a duly qualified officer, sheriff, deputy, constable, marshal, or a specially appointed officer, chosen by the court for the purpose, pursuant to the statute. No one can execute an execution who is

⁵⁰ *Commonwealth v. Magee*, 8 Pa. St. 240.

⁵¹ *Morgan v. People*, 59 Ill. 58.

⁵² *Steele v. Thompson*, 62 Ala. 323.

interested in the judgment. A sheriff should not execute a judgment in favor of his deputy nor the deputy in favor of the sheriff. When several writs in favor of different creditors are put out successively, all the writs should be given to the officer who makes the first levy; for no officer can take the property from the possession of any other officer. Moreover, the same officer cannot at the same time hold property under levy on writs from different courts; for he is the mere hand of the court, and when he has seized the property it is in the possession of the court whose officer he is; to surrender it to the possession of another court is a violation of the duty to the court having the first levy. That court cannot be thus deprived of its jurisdiction. No other court can acquire any rights by taking the property. But the sheriff and all his deputies are but one officer; and after a levy by the sheriff, a writ in favor of another creditor, but issuing from the same court, may, with the sheriff's consent, be levied on the same property by one of his deputies, and held for him; or after levy by the deputy, another writ may be levied by the sheriff. Probably one deputy would not be permitted to levy on property in the hands of another without the other's consent. The sheriff, having made a levy and left the property in the hands of clerks to inventory, directed a junior writ to be given to his deputy, who levied it; later the sheriff received a third writ and indorsed a levy under it without again going to the property, and this was held to be a good levy subject to the prior levies. Nothing would be accomplished by the sheriff returning and

putting his hand on the property, it being already in his possession by his clerk.⁵³

52. **Sheriff's right to indemnity.**—To a limited extent the sheriff is protected by the writ he holds. If the court makes an order within its jurisdiction, though erroneous and unwarranted, it is the duty of the sheriff to execute the order, not set himself up as critic of the court to revise and pass on its decisions. He is not even required to inspect the record to see whether there is a basis for such a writ. He acts on what he has in his hands. But if it is void on its face, it is no protection to the sheriff in obeying it; and what makes the writ void is often matter for debate with the most learned; yet the sheriff is bound at his peril correctly to forecast what will be the decision of the supreme court on the question. From this it will be seen that the sheriff's position is not an enviable one; yet the courts have refused to change the rule while there are plenty of candidates willing to take the office. As a protection against this peril, the sheriff has a right to demand of the creditor a bond of indemnity whenever there is any doubt as to the right in the matter, and to refuse to act till the bond is given. But if the sheriff takes his chances and the property levied is exempt or belongs to someone other than the debtor, and the sheriff is compelled to respond in damages for the wrongful taking, he has no recourse against the creditor unless the creditor explicitly directed that thing to be taken.⁵⁴ If several writs are given to the

⁵³ *Heye & Co. v. Moody & Co.*, 67 Tex. 615, 4 S. W. 242.

⁵⁴ *Nelson v. Cook*, 17 Ill. 443.

sheriff, he demands indemnity of all, and part only give it, and he proceeds to levy and sell and pay the money to those who indemnify, the failure to indemnify is a defense to the sheriff against the creditor whose writ he first received, for failing to pay that creditor any of the proceeds.⁵⁵

53. **Sheriff's right to break in.**—The law protects the person of the debtor and his residence against violation by the officer having mere civil process. The sheriff cannot search the debtor's pockets on his person for money or goods to make the amount of the execution. If the sheriff says to the debtor: "What time is it? Say, that is a fine watch; let me see it. Oh, by the way, I have an execution here against you, and I will keep this watch and sell it to satisfy the execution," this is such a fraud on the debtor's personal security as will avoid the levy and sale.

The sheriff cannot break into the debtor's house to make a levy on his goods, or even to arrest him on civil execution; but if he finds the house open and gets in peaceably he may stay and make the execution, and even break inner doors for that purpose if necessary. A sheriff's deputy with execution went to the house of the debtor, found it open, entered, and was proceeding to levy, when the debtor imprisoned him in a room of the house, whereon the sheriff came with assistants, broke open the house to release his deputy, and while in levied the execution; and such levy was held lawful.⁵⁶ Another sheriff with execu-

⁵⁵ *Cudahy v. Rhinehart*, 133 N. Y. 248, 30 N. E. 1004.

⁵⁶ *White v. Whiteshire*, *Palmer* 52 (Eng.).

tion to arrest a debtor found the debtor in his house sitting by an open window, and reaching through the window touched the debtor on the arm to inform him that he was under arrest, whereon the debtor shut the window and barred the door, but the sheriff was justified in breaking in to make the arrest. With buildings other than the residence the rule is different; the sheriff may break into them to levy, if they are not opened to him on demand, and if there is no one present on whom demand can be made, or who could let him in, he may break in without demand. And what the sheriff may do, any of his deputies or a special deputy may do for that purpose.⁵⁷ The protection which the law gives the debtor in his house is for his benefit only. If he secretes the goods of another there, or makes asylum to protect another from arrest, the sheriff may lawfully break in to make the arrest.⁵⁸

54. When levy, sale, and return may be made.—The prudent sheriff will act at once on receipt of the writ to search for property or person on which to levy it; and the writ regularly states that he shall make the amount of the execution and have the writ with his doings thereon in court at a day named, called the return day. Ordinarily he is not liable for neglect in the absence of special facts urging him to promptness if he acts within a reasonable time, even in some cases including all the time up to the return day. But if he makes no levy before the return day he becomes liable to the creditor to the

⁵⁷ *Burton v. Wilkinson*, 18 Vt. 186, 46 Am. Dec. 145.

⁵⁸ *Semayne's Case*, 5 Coke 91 (Eng.).

amount of the execution unless he proves that it was impossible to make it; the burden is on him to show the fact. If he neglects to make levy before the return day the writ is dead, and all he can do is to return it; if he has made only one levy before the return day he cannot make any levy after the return day. He may make as many levies as may be necessary before the return day to make enough to satisfy the writ; and if he has levied before the return day and has not sold, for want of time, lack of buyers, or other cause, he may and should make sale after the return day, first making due return on or before that day to protect himself from liability to the creditor for neglect. He may and should proceed to sell even after the return of his writ, and he needs no further authority to enable him to do so. But if he neglects, the creditor may further urge him by procuring from the court an order of *venditioni exponas* (you are ordered to put it up for sale), or the like.⁵⁹ If the sheriff has neglected to make return as he should, his return later is nevertheless valid, and no one but the creditor can complain of his remissness and neglect.⁶⁰

BIBLIOGRAPHY.

Abraham C. Freeman, A Treatise on the Law of Judgments.
Also a Treatise on the Law of Executions by the same author;
Henry M. Herman, A Treatise on the Law of Executions;
Philip E. Mather, Sheriff and Execution Law.

⁵⁹ *Acton & Woodnutt v. Knowles*, 14 Ohio St. 18.

⁶⁰ *Smith v. Osgood*, 46 N. H. 178.

QUIZ QUESTIONS

JUDGMENTS AND EXECUTIONS

(The numbers refer to the numbered sections in the text.)

1. Define the judgment and distinguish it from the other things done by the court in the progress of the case.
- 2-3. Name six fundamental indispensables of jurisdiction and illustrate each.
4. (a) The judge being sick, the parties agreed that a lawyer present should sit as judge. He heard and decided the case. May execution issue thereon?
(b) To ejectment claiming title as heir of B, defendant showed title as purchaser at a sale ordered and confirmed by the probate court of a Confederate state during the Rebellion. Is that a defense?
5. A claim for injuries from defective sidewalks was presented to the city council and denied, whereupon suit was brought, to which the city pleaded the order of the council in bar. Is the plea good?
6. It develops that the judge who decided a case is the brother of defendant's wife. Is the judgment void? If so, how is the defense available?
7. Is a plea in avoidance of a judgment that the supposed judgment was rendered on Sunday, a good defense?
8. Is a plea that the justice rendering the judgment heard and decided the case at a place outside of his regular office, and where he had never before held court, a good defense to an action on a judgment? Why?
9. To a bill for divorce on the grounds of adultery, defendant pleaded that before the alleged adultery defendant had obtained a divorce from plaintiff. On the trial it appeared

that in the suit in which such divorce was obtained no ground for divorce was alleged or proved, and that present plaintiff was by fraud persuaded not to make defense. Is the court bound by the prior decree?

- 10-11. What would be the result if, when a prior decree was offered in evidence, the judge were not bound by that decree?
- 12-14. (a) In ejectment defendant showed title by sale under execution on a judgment recovered in an action in which process was served on the defendant therein by publication and by service on him personally in another state. Is the title good, and why?
- (b) Would it be material that such judgment was rendered after trial in which defendant made defense, or by an appellate court after such defense without further service of process on defendant therein?
15. Is a law constitutional which provides that process to sue any corporation, domestic or foreign, may be commenced by service on the secretary of state of the state without further service on the corporation or any of its officers? Why?
16. In a suit to recover money due, is it a defense that the defendant has already been compelled to pay the amount in a suit in which he was summoned as garnishee in another state, where the present plaintiff was not served and did not defend? Why?
17. In an action to quiet title, plaintiff prayed that defendants' title be decreed null and void. The decree was that plaintiff had absolute title. This decree is set up as defense to ejectment by A's wife. Is it a defense, she having been a defendant in the prior suit? Why?
- 20-21. To a suit to collect a judgment rendered on an assessment on a drainage tax, it is pleaded that the petitioners for the ditch were not of the number required by law, were not all freeholders, and some were not citizens. Should the defense be sustained, and why?
- 22-24. Defendant asks the court to correct a record of judgment against him by cancelling the entry that he pay the costs to be taxed. Can the judge order such cancellation if the judgment is three years old and there is nothing but the unsupported recollection of the judge to dispute the clerk's entry?

- To suit on a judgment, defendant offered to show that he was not served with process therein, did not appear, knew nothing of it, that the attorney who purported to have appeared for him was unauthorized to appear and in fact did not appear. Plaintiff objected to admission of such evidence, on the ground that the record stating such service was the only proper proof. Was the evidence competent, and why?
27. The court ordered judgment for the plaintiff for \$300, Friday at 4 p. m. Court did not sit again till Tuesday, which was the first day of the new term. At the opening of the court plaintiff asked the court to add interest on the allowed item, amounting to about \$100. The judge said he had intended to do so but forgot it, and then ordered the other \$100 added to the judgment. Is such order valid, and why?
3. What is the effect of a judgment on the merits on subsequent suits for the same cause?
9. I have several tax deeds against your land, I sue on one of them and fail, then sue on another, and you plead the first suit and judgment in bar. Is the plea good? How would it be if the first suit had been by you against me and I had merely set up the first deed as defense and failed?
10. You sue me for the price of a wagon and get judgment, which you set up as a defense to my action for damages for breach of warranty, in that the wagon broke down from secret defects before you sued. Is your judgment a defense?
1. Can I avoid certain judgments against me by showing that these judgments were obtained by bribing my witnesses not to appear or testify for me?
2. Distinguish a non-suit from a retraxit. May it be proved by parol that a judgment on general denial was in fact rendered because the suit was prematurely brought?
3. Distinguish bar from estoppel. Which is the broader?
- 4-35. (a) Is the former judgment an estoppel if one of the present defendants was not party to the former suit?
(b) What if he was one in whose interest the suit was prosecuted, but was not named as a party?
3. Can a defense be made to the new action that might have been made to the old but was not set up?

37. Defendant pleads three several pleas, and a general verdict is rendered in his favor. To a new action on another cause two of these pleas are good defenses, and he pleads the former judgment as an estoppel. Is the defense good?
38. Is a judgment for defendant in a criminal action by the government for cutting timber on government land, in which the defendant pleads not guilty, a defense to an action by the government for damages for the same trespass? Why?
39. Is the decree of the probate court denying a claim against the estate because of a deed of settlement made by the parties, a defense to a bill in chancery to have such deed set aside for fraud and defendant called to account? Why?
40. I buy a piece of land but do not record my deed, and you sue the person having the title of record to quiet the title. Is that decree binding on me if my title was derived through him?
41. What is essential to bar unborn persons by a judgment?
42. Is an order appointing Jane administratrix of the estate as surviving widow, an estoppel against the claim of Mary to dower as widow, and why?
43. Judgment is rendered for plaintiff in replevin, but without damages or costs. What is the appropriate execution?
44. If the judgment had been for plaintiff, including damages and costs, what would have been the proper writ?
46. Under a statute declaring judgments a lien on land for a year if execution is issued within that time, plaintiff obtained a writ from the clerk of the court, addressed it to the sheriff to be executed, and deposited it in the post-office on the last day of the year. The sheriff obtained it in the mail next morning. Does the lien continue?
47. To an action against the sheriff for the amount of a judgment on which he had received execution and returned it unsatisfied, he pleaded that defendant died the day before he received the writ, and plaintiff demurred. Does the action lie?
- 48-49. (a) How do you determine whether an execution is in the proper form, and the effect if it is not?
(b) From what court does execution issue?
50. To an action by an assignee of a judgment against the sheriff for not collecting, he pleaded that the judgment

creditor ordered him not to levy. Is it a good defense, and why?

1. On execution against A, the sheriff seized the horse of B, who replevined it. Is the suit maintainable, and why?
2. On trover against a sheriff for wrongful levy, the plaintiff in the execution defended the action for the sheriff, but judgment was recovered and paid. Can the sheriff recover the amount thus paid from the plaintiff?
3. A special deputy was appointed to levy execution. He went to a warehouse at night, broke in without asking for admission of anyone, took butter from the warehouse and sold it on the writ, for which the defendant sued him in trover. He set up the writ as a justification. Is it a defense?
4. A sheriff sold goods after returning the writ on which the levy was made, and without receiving any new authority. Did title pass?

PART IV

PARLIAMENTARY LAW

BY

JOHN H. PERRY, A.M., LL.B.*

CHAPTER I.

INTRODUCTION.

1. **Preliminary statement.**—Parliamentary law may be divided into two parts, the equivalents of common and statutory law.

Common parliamentary law, in its origin, was founded upon the practice of the English Parliament but has little at present, except its name, to suggest that origin.

Before Jefferson, early in the last century, wrote his manual, American parliamentary law was principally a collection of English precedents, which were admired because they were precedents and not because they were admirable. Parliamentary law cannot yet be said to be perfected, but it has acquired a practical efficiency beyond which little is to be desired or expected. Of course many questions will arise about which authorities seem to differ and the practice to vary. These, however, are, in the main, non-essential, and this lack of petrification is characteristic of living, as distinguished from dead, systems in all fields of learning.

* Former Lecturer on Parliamentary Law, Yale University.

Most deliberative bodies, exercising thereby an inherent right, enact a few special rules for their own guidance. These rules modify or add to the common parliamentary practice of the text books and thus correspond with the statutory division of municipal law. Some of these special rules are of frequent occurrence and will be referred to hereafter. An original treatment of the subject is no longer possible and would not be useful if attempted. This article is, accordingly, much indebted to the standard manuals. (See Bibliography at end of this article.)

2. **Organization of assemblies—Members.**—Inasmuch as the law of debate presupposes a lawful debater, a brief consideration of the organization and membership of assemblies stands at the threshold of parliamentary law.

Assemblies differ not only in their character as voluntary and prescribed by law, but also in the nature of the right of membership. Some require an elaborate, others the simplest, organization.

An assembly may be a voluntary one called together by interested parties, and of such anyone who is invited will be a member. Political mass meetings are of this class. Again, an assembly may be prescribed by law, and those only can be members who are chosen in accordance with that law, or who, by virtue of credentials regular on their faces appear to have been so chosen. Legislatures are examples of this class. Other assemblies are constituted pursuant to a call by competent authority in such a way that each member, though chosen by a

voluntary body, must present evidence of such choice. Political nominating conventions are of this description.

It is evident that these different kinds of assemblies require different kinds of organization. Those the membership of which cannot be in dispute organize at once and need but a simple system. Those the membership of which might be in dispute cannot fully organize until the preliminary question of membership is settled. In legislative bodies some officer, specified by law, makes up a roll which is regarded as conclusive for the time being, and those named thereon having been called to order by him or by some other specified person, proceed to permanent organization. Until the presiding officer is chosen this person presides. In such assemblies as nominating conventions, the right to sit in which is attested by credentials, a temporary organization is first had, the credentials are immediately examined by a committee whose report is submitted to the assembly and passed upon, and the permanent organization follows. All kinds of deliberative assemblies, however, have and exercise the right, should any question arise, to pass finally upon the qualifications of their own members. When a question arises involving the right of a member to his seat he is entitled to be heard on the matter, but should withdraw before a vote is taken.

3. **Officers.**—The usual and necessary officers of an assembly are a presiding and a recording officer, both of whom are chosen by the assembly itself except in the case of presidents of senates. The

president of a state senate is usually the lieutenant governor *ex-officio*. The president of the United States senate is similarly the national vice-president. The presiding officer of a house of representatives is called the speaker, in other bodies he is called the president, and the recording officer the secretary, although these officers are sometimes designated, respectively, chairman and clerk. The presiding officer of a religious assembly is usually addressed as moderator, and the recording officer as scribe. A vice-president or a president *pro tempore*, if appointed and present, should preside whenever the president vacates the chair. The secretary of state generally calls a new state senate to order and presides until the lieutenant governor is sworn in or a president *pro tempore* elected. Houses of representatives are first presided over by the speaker of the preceding house. The chairman of the state central committee calls the state convention of his party to order and frequently designates the temporary chairman. Town meetings are called to order by the first selectman and then proceed to elect a chairman. Voluntary assemblies may well be called to order by the person or one of the persons upon whose invitation they meet.

In selecting a chairman for any meeting all necessary or desired nominations for officers should first be made. The person calling the meeting to order should then rehearse the list of nominees and put the vote upon each in the order in which they were nominated. A presiding officer can never be properly chosen by a mere plurality of votes even in those states in which state officers are so elected,

unless the assembly, by a majority vote, has previously so ordered. He should be chosen by, or in accordance with the direction of, a clear majority of the body in which he is to officiate, for otherwise he might, by a majority vote, be removed as soon as seated.

4. **Control of meeting place.**—The place where an assembly is held being in its possession, no person is entitled to be present there except by its consent, and if any person refuse to withdraw or conduct himself improperly the assembly may, unquestionably, employ sufficient force to remove him. It may keep its own members in as well as strangers out, both of which rights are frequently exercised.

5. **Special rules of procedure.**—After organization rules of procedure should be adopted if any departure from common parliamentary practice is desired. When thus adopted these rules will, *pro tanto*, supersede the common law. To avoid all disputes as to what the common parliamentary law is it is prudent for the assembly to specify the textbook which shall declare it. A difference of opinion exists as to whether rules once adopted can be modified in any other way than that prescribed in the rules themselves. The weight of authority holds that they cannot.

6. **Quorum.**—The “quorum” of an assembly is that number which must be present to make the assembly a body competent to transact business. There is no rule applicable to all cases. Assemblies which are not representative or judicial and where all are principals, do not require a quorum. Town

meetings in New England, stockholders' meetings, and voluntary gatherings generally are of this class.

Where a body is a representative one performing the functions of government for a constituency, or a financial one managing the business of the corporation which selected it, the quorum is a majority. Legislatures, city councils, and boards of directors are of this class. Where the body is appointed to perform an act which requires the exercise of judgment, the whole body constitutes the quorum. All must be present and deliberate, although the majority is competent to act. Courts and referees are of this class. In most public bodies the number necessary to make a quorum is fixed by law. In voluntary bodies it may be fixed by the body itself. The quorum required to render an assembly competent to transact business is a present quorum and not a voting quorum. If the number necessary to make a quorum is actually present, it makes no difference how many or how few participate in a decision. Those who sit silent are regarded as consenting to the result.

In strictness, a chairman ought not to take the chair until after the appearance of a quorum, but in practice he generally does and, until the question is raised, a quorum is always assumed to be present, even when neither the voting nor the appearance of the assembly indicates it. If, when the question is raised, a count of the house discloses the absence of a quorum, the assembly must adjourn, unless it remains in session to persuade, or (if given that right by law) to compel, the attendance of absent members. If it adjourn, it may fix the time to which

to adjourn, but not beyond the next sitting day. For legislative bodies these matters are generally regulated by constitutional provisions. If a quorum be present, a majority of that quorum may transact business. Accordingly, in a common council of twelve members when seven are present, four, a mere majority of that number, may pass votes which bind the whole council.

7. **Order of business.**—The order in which business shall be conducted is usually prescribed by a rule of the assembly and, when prescribed, should be followed. In meetings held pursuant to an invitation or under a formal call, for which special rules are seldom adopted, the order of business should follow the specifications of the call in so far as that is practicable.

8. **Determinations—How arrived at.**—Determinations are arrived at by the majority of votes. Unless there be some binding regulation to the contrary, a proposition is carried by a majority of the votes cast (a quorum being presumed to be present), for the right of the assembly to arrive at conclusions is not impaired by the mere silence and inaction of some of the voters in the room. The majority principle, however, may be modified by a special rule or binding law, under which a less number than a majority is admitted, or a greater number required, to define the will of the assembly with reference to some particular subject. Thus, it is generally provided in legislative assemblies that one-fourth or one-fifth of the members present may require the taking of a vote by yeas and nays and,

on the other hand, that no alteration in the rules shall be made except by a two-thirds vote.

9. Presiding officer—Conduct and rights.—Where but one presiding officer is originally appointed and for any reason a substitute for the time being becomes necessary, the proceedings leading up to his choice should be conducted by the recording officer. The presiding officer, however, when leaving the chair temporarily, may always call some member to take his place. This appointment is vacated by the next adjournment (unless the presiding officer sooner resumes the chair) and is always subject to the will of the house. The presiding officer should rise when addressing the assembly, or stating a motion, or putting the question. He may read a communication or recognize a member when seated. Where the presiding officer is a member of the assembly, his right to participate in its actions and debates admits of no question. That he should not do so, save upon rare and extraordinary occasions, is equally certain. Except in the case of an appeal from his ruling, he should never debate from the chair, and he is expected to vote only in certain contingencies, to be hereafter explained.

10. The clerk.—If but one clerk is chosen and he is at any time absent, his place should at once be filled. The clerk should be a good reader, with considerable knowledge of parliamentary law, and the ability to express himself concisely and accurately in writing.

11. The journal.—The journal in legislative bodies should contain what is “done and past,” but

not what is said or what is merely proposed or moved without coming to a vote. In some other bodies, as, for instance, religious or political assemblies, what was said may be as important as what was done. In such cases the minutes are properly much more extensive and may become practically a report of the entire proceedings.

12. Members—Their rights and duties.—The rights and duties of members are easy to state but difficult to enforce. The *rights* of each member are based upon the doctrine of his equality with every other member. He has, therefore, the right to present his propositions and to debate them according to the rules. Each member has the right to insist that the assembly be in order and may rise to demand the same, but in so doing must not increase the disorder.

The *duties* of each member arise from his being a component part of an assembly which desires to act together, and in order to act together, must come to some agreement. The member must maintain order and refrain from conversation. He should not engage in other business than that before the meeting, or pass between the member who has the floor and the presiding officer, or interrupt a member who is in order except with his consent. He should not use discourteous expressions, or employ even proper parliamentary motions to create discord or to impede, unreasonably, the common action.

13. Disorderly conduct.—In all instances of disorderly deportment, it is competent for every member, and is the special duty of the presiding officer,

to call attention to the offense. When this is done by the presiding officer he is said to "name" the offender. The member thus complained of is entitled to be heard in his own defense, but must then withdraw unless given permission to remain. The assembly thereupon determines the punishment, which may consist either of a reprimand, a prohibition from speaking or voting for a specified time, or expulsion. As an alternative to expulsion, a disorderly member is sometimes required to apologize. The disorderly conduct above referred to does not include such offenses as the use of wrong motions or a mistaken sequence of procedure, which will be considered hereafter.

CHAPTER II.

THE INTRODUCTION OF BUSINESS.

14. **Preliminary statement.**—The will of an assembly is evidenced by the agreement of the greater number of those voting, and the first step to that end is the submission of a proposition or motion which will form a basis for the further proceedings of the assembly, this proposition to be assented to, rejected, or modified, according as it expresses or not, or may be made to express, the sense of a majority of the members. The different proceedings which take place from the first submission of a motion through all the changes it may undergo until the final decision of the body upon it, constitute the subject-matter of that division of parliamentary law which governs debates.

There are, of course, different forms in which different kinds of actions are put. When an assembly commands, it is by an order. If it desires to express its opinion or purpose or make a statement of facts, a resolution is the usual method. If a legislative body, it enacts public laws by means of a bill which, when approved by all those entitled to deal with it, becomes an act. Bills, not public in their nature, are sometimes called resolutions.

15. **Business, how begun.**—The beginning of business in either of the forms above referred to is its introduction by a member from the floor. Only

members on the floor have a right, ordinarily, to present business to the assembly. The presiding officer, it is true, may lay before the assembly certain kinds of business, but this is always by virtue of some special rule. The presiding officer is under no obligation to present any communication sent to him by persons outside the body over which he presides. The only way in which a person, not a member, can reach the assembly is through a member.

If the proceedings of a deliberative assembly were confined to the making of propositions by the individual members and their acceptance or rejection by the votes of the assembly, parliamentary law would be indeed simple. But this is not the case. Members are not limited to giving an affirmative or negative to such questions as may be proposed. They may be unwilling to act upon them at all, they may desire to postpone their consideration to a future time, they may be willing to adopt them with certain modifications, or they may prefer to have them first considered in committee. These are but a few of the many preliminary or collateral steps which may be taken, and motions adapted to each have been invented, thus establishing numerous and intricate rules which effectually deprive parliamentary law of the right to be called simple.

16. **The "floor"—How obtained.**—Whenever a member desires to introduce business he rises in his place and addresses the presiding officer by whatever his title in that particular assembly may be. The chair thereupon recognizes the member and says: "Mr. A has the floor," or simply "Mr. A."

legislative assemblies the presiding officer recognizes the member by the name of the community he represents and never by his own name. For instance, in Congress the speaker would say: "The gentleman from (naming his state)." In a state legislature he would say: "The gentleman from (naming the locality he represents)." If the name of the constituency of the person asking for recognition is not remembered, the chairman may, and often does, say: "The gentleman on the right" or "left" or "in front of the chair," pointing at him with the level.

After the member thus rising has been recognized by the chair he "has the floor," by which something very different from merely standing thereon is intended. If two or more members rise and address the presiding officer at the same time he, theoretically, should always give the floor to the person whose voice he first heard, not the person whom he first saw. In practice he is generally able to train his members to wait upon his will and so hears first the one whom he prefers to recognize; but the house has the ultimate decision in the matter and may overrule the chairman's recognition. When the house is appealed to the question should be taken first upon the name of the person recognized by the chair.

17. Making the motion.—When a member has been recognized and so obtained the "floor," he states his proposition which, if in the nature of a resolution or motion, he must reduce to writing if so requested by the chair or any member. This applies only to the main question and to such motions as

are variable. The formal motions, which are always in substantially the same language, need never be written. Until the member "has the floor" the proposal of business by him is not in order, but the member may state his purpose in rising and if he demands the floor to introduce a privileged motion or any matter which has prior right, as, for instance, a point of order, he should be recognized at once.

18. **Petitions.**—Petitions stand in a class by themselves, and will here be considered parenthetically. A petition is a communication from persons not members of the body who, therefore, could not address the house directly. The member who presents it rises in his place and, when recognized, informs the assembly that he has a petition, stating briefly its object, which he desires to present. The usual form is: "Mr. Chairman (or Speaker), I beg leave to present the petition of _____ relative to _____." The presiding officer usually assumes that there is no objection to its reception and casts the burden of objecting, if any one desires to do so, upon the assembly. The petition, unless objection is successfully made, is brought to the table and there read by the clerk. It is then dealt with as its purpose requires and the assembly wishes.

19. **Ordinary business, how introduced—Seconding.**—Whenever a member has a proposition of his own to make (as distinguished from a petition) he puts it into the form which he desires to have it bear, rises in his place, addresses the chair, obtains recognition, and moves that it be adopted as the resolution, order, or vote of the assembly.

After the motion has been thus made it must, theoretically, have the support of another member who rises in his place and says: "I second the motion." This requirement of a second is based on the idea that if a motion has no other friend than the mover it is useless for the assembly to spend any time upon it. If a motion be not seconded common parliamentary law does not, in strictness, require the presiding officer to take any notice of it, except in those few cases in which one member alone has the right to institute or direct a particular proceeding. On the other hand, special rules sometimes require certain motions to be seconded by more than one member. In actual practice the requirement of a second is less and less insisted upon. No motion is seconded in the National House of Representatives except (if demanded) a motion to suspend the rules, and in few states does one ever hear a second in these days. If the presiding officer entertains a motion that ought to be second enough, unless some member insists to the contrary.

20. Business—When in possession of the house.
—When the motion has been stated to the assembly by the presiding officer or read at his direction by the clerk, it is said to be "in the possession of the house." Until that time no member has a right to make any motion in relation to it, or debate it, or to ask the floor for either purpose. On the other hand, until then the mover may modify or withdraw it, but not after that, except upon leave given by the assembly. This principle, however, is frequently and wisely abrogated by a special rule permitting the

mover to modify or withdraw his motion "at any time before decision or amendment."

21. **Questions—How put.**—The business thus in possession of the house is called "the main question." The presiding officer says: "Mr. A," or "the gentleman from B," or "the Senator from the ————, moves so and so," or "offers the following resolution. Please to hear it read." After the motion has been stated or the resolution read he says: "The question is upon the adoption of the motion," or "resolution," and adds: "Are you ready for the question?" Then, and not until then, is debate in order. A motion to "reject" a measure is improper. The question is always upon its *passage* and it is then rejected, if so desired, by voting no. If no member has anything to say or propose, the chairman puts the measure to vote as follows: "Those who favor the question will say Aye—those opposed No." After the vote he says: "The ayes (or noes, as the case may be) appear to have it. Is it doubted?" If no one, rising in his place, doubts the determination, he adds: "The ayes (or noes) have it. The motion is adopted (or lost)."

If there is no reasonable doubt of the accuracy of the determination the chairman, in the absence of a special rule, is under no obligation to try it again, but in such case he should not ask, "Is it doubted?" It is the duty of all who care to vote at all to vote the first time and, if they fail to do so, they must abide the result. If, however, there is room for a reasonable doubt the vote should be tried again by sound of voices, and if the result is

ill doubtful, a standing vote, or some other equally accurate method of determining it, should be tried. When a standing vote is ordered the chairman says: "As many as favor the motion will rise and stand in their places until counted." After the count he says: "You will please be seated. Those opposed will rise and stand in their places until counted." The count may be made by the chair or clerk or by tellers appointed by the chair.

22. Voting by roll call.—The assembly may always direct how any particular vote or how all votes shall be taken except that, under the National constitution and those of several of the states, the yeas and nays may be ordered by one-fifth of the members present. This order may be made at any time before a vote taken in some other way is declared. The process of taking a vote by yeas and nays is as follows: The presiding officer says: "The question is (whatever the question may be). As many as favor the question will, when their names are called, answer 'Yes'; those opposed, 'No.' The clerk will call the roll." Thereupon the clerk calls each name in alphabetical order and as each member answers notes his vote. After the first name has been called the roll cannot be interrupted, even by the arrival of the hour fixed for adjournment. When the roll has been called through the chairman says: "Those voting 'yes' are —"; then the clerk calls the names of those noted as voting "yes." When this is finished the chairman says: "Those voting 'no' are —," and the clerk reads the names of those noted as voting "no." Then the chairman says:

“Those absent or not voting are—,” and the clerk reads their names. When all desired corrections are made the clerk ascertains the result and the chairman declares it.

If the number voting is less than a quorum that fact does not of itself determine the invalidity of the decision, but the house must be counted for the purpose and the result of this count will alone determine the facts, although it is the duty of every member of a deliberative assembly, if present, to vote when the question is first put.

23. **When the presiding officer votes.**—The presiding officer, when a member of the body, has, as already stated, an undoubted right to vote upon every question. In practice, however, he is not expected to vote, except when a ballot is taken or when his vote would change the result. He is expected to vote accordingly when his vote, if given on the side which he favors, would make a tie, or break a tie and thereby change the result, or complete or defeat a required two-thirds (or other fractional) vote and likewise change the result.

CHAPTER III.

SUBSIDIARY MOTIONS.

24. **Preliminary statement.**—We are now prepared to consider the various kinds of motions which may follow the launching of the main question and postpone the final vote upon it. When a motion is regularly before the assembly, no other motion can be received unless it be one which takes precedence of the question under consideration and is entitled to be first decided. Motions thus previous in their nature are divided into three classes or groups and called “subsidiary,” “privileged,” and “incidental.”

25. **The subsidiary motions and the precedence among them.**—Subsidiary or secondary motions are those which relate to a principal motion and are made use of to enable the assembly to dispose of it in the most acceptable manner. The usual subsidiary or secondary motions are: (1) To lay on the table; (2) for the previous question; (3) to postpone indefinitely; (4) to postpone to a time certain; (5) to refer to a committee; (6) to amend. These motions are entitled by the common parliamentary law to certain precedence as among themselves.

The authorities are not entirely agreed about it, but the better opinion seems to be that to lay upon the table stands first; then the previous question, to postpone, either indefinitely or to a time certain, and to commit or refer (but with no precedence as

among these latter) and, last of all, to amend, although there is good authority for classing indefinite postponement and amendment as of equal rank. This common law order, however, is generally changed by a special rule in assemblies of importance. The order of precedence usually adopted is: (1) To lay on the table; (2) for the previous question; (3) to postpone indefinitely; (4) to postpone to a time certain; (5) to commit, refer or recommit; (6) to amend. A consideration of the form, nature, and effect of each of these motions is next in order.

26. **Motion to lay on the table.**—This motion is, theoretically, a motion to suspend the consideration of a question during the pleasure of the house. It is not debatable or amendable. When a question is tabled it usually carries with it all connected questions. Thus the main question carries all pending amendments and a tabled amendment carries with it the main question. However, motions to reconsider and appeals from the rulings of the chair, if tabled, carry nothing with them. Tabled matter may always be taken from the table at the pleasure of the house and, when called up, comes before the assembly precisely as it stood when tabled with all the amendments and motions then pending. While the motion to lay upon the table has first privilege among subsidiary motions, the motion to take from the table has no privilege at all. In the National House of Representatives, by a special rule or custom, tabled matter cannot be taken up again. While this is the practical result in all other bodies, it is not the necessary one. If the motion to lay upon the table

defeated, the original question proceeds as before and the motion to table may be revived whenever new business has intervened or the original question has progressed one or more steps. A distinction is made between the "speaker's table" and "the table of the house." The latter table is alone the subject of the motion in question. Whatever is under the present consideration of the assembly, or, having been taken up, is for any reason temporarily laid aside, is said to be on the speaker's table.

27. Motion for the previous question.—This motion in the United States, and at the present time, has lost its original purpose and effect as used in England. In England the proposers of the motion desire a negative decision and use it to defeat the measure. We desire an affirmative decision and use it to forward the measure. Accordingly, while the effect of an affirmative vote both in Parliament and here is the same, viz., the putting of the main question immediately and without further debate, delay, or intervening motion of any kind, even to adjourn, the effect of a negative vote has come to be radically different in the two countries. In England all further discussion of the matter is suspended for at least the day, while in this country the consideration goes on as if the motion had never been made.

The different effect which our practice gives to a negative vote upon the question renders desirable a change in the traditional form of putting it. That form is: "Shall the main question be now put?" A better form would be: "Mr. A moves the previous question; as many as favor the motion will say 'aye,'

those opposed, 'no,''' etc. The motion for the previous question, although debatable in England, is not debatable here and cannot be amended.

At common law it can be applied only to the main question, and therefore, if amendments are pending, inasmuch as the road back to the main question lies only through these amendments, the vote must be taken first upon the pending amendments in their order and lastly upon the main question, and all forthwith without debate.

It is customary, and very desirable, to give the previous question, by special rule, precedence over all subsidiary motions except to lay upon the table, and, whether with or without a special rule, it is customary also to permit it to be applied specifically to pending amendments or any other debatable motion which has for the time being taken precedence of the main question. In this case if the previous question be ordered, the vote under it will only be taken upon that particular motion against which it was specifically directed.

28. Motion to postpone indefinitely.—This motion is designed to avoid a direct vote on the question itself and to give its opponents an opportunity to try their strength at any stage of the proceedings. If carried, the matter is defeated; if not, it proceeds as before. This motion cannot be amended, but is not only debatable itself, but throws open the whole question to debate. By special rule, however, it is often made not debatable.

29. Motion to postpone to a time certain.—The object of this motion is to obtain time for considera-

in or to make an opening for more pressing business. It is debatable as to its own merits, but does not open the main question. It can be amended as of the date, but when amendment is desired the best way to treat the situation is to consider the date at hand and proceed to fill it from such dates as may be suggested, putting the question first upon the date which is most remote. When the motion prevails the matter becomes the order of the day at the time named.

30. Motion to commit, refer, or recommit to a committee.—When the assembly has much business and standing committees have been appointed, the committal is usually made, as of course on first presentation, to the appropriate one of those committees. In other cases the motion for reference may itself create a special committee for the purpose, or propose a reference to a committee to be raised. The reference may be with or without instructions. If instructions are given they must be followed. The motion to commit may be amended and is debatable, but the merits of the main question are not open for discussion, since that discussion will be only pertinent after the committee reports. If, however, the motion be to commit with instructions as to the main question, then debate can be had upon the merits.

31. Motion to amend—Preliminary discussion.—When the assembly is willing to consider the subject matter of a proposition, but is not satisfied with its form, the course of procedure is to bring it into satisfactory form by means of amendments or proceedings of a similar character.

There are two proceedings of a character similar to amendments which should first be considered.

(a) *The division of the question.* This division may be ordered by the assembly on motion, which motion may be amended. It is not the right of a member as matter of course, to have a compound question divided into parts for action, although that right is sometimes asserted. A compound question can only be separated by moving amendments or moving for a division of it, unless the assembly has by special rule provided otherwise. A proposition, to be divisible, must embrace points so distinct that each could stand by and be complete in itself. If the assembly refuses to divide the question, a motion to strike out may accomplish the desired result. Another proceeding similar in character to amendments is:

(b) *The filling of blanks.* Sometimes a measure is submitted with blanks for dates or amounts. When it is proposed to fill these blanks, the propositions—although in effect amendments—are not treated precisely as amendments, but are marshaled and put to vote in such order that the largest sum or the longest time is tried first, and so backward until one is adopted and the blank filled. When two propositions might be better put into one, or one more properly distributed into two, or paragraphs or sections should be transposed, common consent for the changes may well be first sought before resorting to motions for amendment. If a proposition is rearranged so that the original numbering of its sections is wrong, they may be renumbered by the clerk and motions for that purpose are not needed.

B2. Amendments, strictly so-called.—Recurring now to amendments, strictly so-called, every amendment which can be proposed, is itself susceptible of amendment, but amendments cannot be proposed beyond an amendment to an amendment. If an amendment to an amendment is voted down or rejected, then another amendment to the amendment can be proposed, but not before. When an amendment is pending all other proposed amendments must be confined to that. Two amendments to different parts of the main proposition cannot be pending at the same time. An amendment, once agreed to, cannot afterwards be altered or amended, except by general consent, although the main question as so amended may be finally rejected. The inconsistency of a proposed amendment with one already adopted is good ground for its rejection by the assembly, but not for its suppression by the chair. If an amendment is defeated it cannot be again proposed except with such changes as alter its sense. If an amendment by insertion is adopted the words inserted cannot be afterwards stricken out except in connection with enough other words to make a new proposition. If a motion to strike out a paragraph be lost, that same paragraph cannot afterwards be amended. The effect of the refusal to strike out is to make it a permanent part of the original proposition. If the motion to strike out be carried, the words in question cease to be a part of the proposition and cannot be reinstated except with the addition of enough others to make a new proposition. A motion to strike out or insert is, by the better practice,

indivisible. The rules immediately preceding are logical and should be observed.

When a motion is made to strike out a paragraph and insert another, the friends of each paragraph have a right by amendments to make it more acceptable and then the vote is taken as between the two in their perfected form. Likewise, when a motion to strike out or a motion to insert a paragraph is pending, it is in order for the friends of the paragraph to try to make it acceptable by amendment before the motion is put. An amendment by striking out all after the enacting clause and inserting a new bill is only one form of striking out and inserting. An amendment by striking out the enacting clause, so as to defeat the bill, gives way to amendments intended to remove objections to it. Amendments are not always proposed by friends of the measure or intended to improve it. It is entirely lawful so to amend a measure that no one will desire its passage. An amendment is never out of order simply because it is inconsistent with the original motion. The only limitation is that "no motion or proposition on a *subject* different from that under consideration shall be admitted under color of amendment."

After all desired amendments are adopted the proposition, as amended, must be put to vote again even if the amendments have made an entirely new and complete motion. Likewise, a proposition adopted in paragraphs must be acted upon anew as a whole, and may be rejected on this final vote.

CHAPTER IV.

PRIVILEGED MOTIONS.

33. Preliminary statement.—The next class of motions which take precedence of the main question are privileged motions. These arise out of the needs of the assembly as a deliberative body. They concern only indirectly the main question, and that merely in so far as they delay action upon it, yet they take precedence of all others. This is because they are essential not only to the proper consideration of that question but to the existence of the assembly itself as a working parliamentary body. They are unequal in rank among themselves. Three are called “privileged motions.” Two classes are called “questions of privilege.” The privileged motions are: (1) To adjourn; (2) to fix the time to which to adjourn; (3) to take a recess, and a clear knowledge of the rules governing them is necessary.

34. Motion to adjourn.—The motion to adjourn seeks to enable the assembly to rest and is highly privileged. It is frequently said that “a motion to adjourn is always in order,” but there are too many exceptions to make it safe to lay down the rule quite so epigrammatically. For instance, a motion to adjourn cannot be made while a member has the floor, cannot interrupt the taking or verification of a vote and cannot be repeated until some business has intervened.

When the assembly has not fixed the time to which it will adjourn, and that time is not fixed by law, adjournment would be equivalent to dissolution and is consequently debatable and opens a field for discussion that is wide indeed. The motion to adjourn which is privileged is merely a proposition to stop then and resume at another time. If made when no other business is pending, it is claimed by high authority that it can be amended and debated like other questions. If made when other business is pending, it can neither be debated, nor amended, and takes precedence of everything. To have this rank, however, the motion must be simply to adjourn without the addition of day or time. If another element is added it becomes debatable and amendable. A vote to adjourn does not require a quorum, neither does a vote fixing the time to which to adjourn if the time has not previously been fixed. The effect of an adjournment upon pending business is probably to postpone its consideration to the subsequent day and on that day, after the reading of the journal, it should be taken up in the condition in which the adjournment left it. However, the authorities differ about this.

35. Motion to fix the time to which to adjourn.— The motion to fix the time to which to adjourn is also highly privileged when no time has been previously fixed as the regular hour of meeting after adjournment. In that case it takes precedence of any pending motion, including a motion to adjourn but not a motion for a recess for a definite time. If the assembly, however, has fixed the time for reas-

umbling after adjournment, a motion to fix a different time has no priority over pending motions.

36. Motion to take a recess.—When the time has been fixed at which the session shall be resumed, a motion for a recess to that time, like a motion to adjourn for which it is the equivalent, is highly privileged and is not amendable or debatable. This is likewise true of a motion for a recess for a definite time short of the time so fixed, or at least, on principle, this should be so.

37. Questions of privilege.—Questions of privilege are, first, those affecting the assembly collectively, and, second, those affecting the rights, reputation, or conduct of members individually. Examples of breaches of privilege of the first class are disturbances, divulging the secrets of the body, or tampering with its records. Examples of the second class are an attempt to bribe a member, or the slander of a member. Questions of privilege are preferred between themselves in the order above given, viz., first, questions which relate to the assembly; second, questions which relate to members; but either take precedence of all other motions except the three privileged motions when those are not debatable or amendable. It is said that they may even take a member from the floor and interrupt his remarks.

38. Questions of privilege—How raised.—Questions of privilege are addressed to the presiding officer. The member, rising, says: “Mr. Chairman, I rise to a question of privilege.” The Chairman says: “The gentleman will state his question.” The member thereupon states the question and the chairman

decides whether it is privileged or not. If the ruling be that it is not privileged the business before the assembly is resumed. If the question be privileged, then it is for the assembly to take action upon it as upon any other matter. After it is disposed of the interrupted business is resumed.

39. Motion for orders of the day.—A motion to proceed to the orders of the day is to a considerable degree privileged and therefore is sometimes classed with privileged motions. This motion is not debatable or amendable. It may be made when a member has the floor, and takes precedence of everything except the three privileged motions and questions of privilege. If decided in the negative, the orders are discharged and the pending business proceeds. The form of the question is: “Shall the orders of the day be taken up?”

CHAPTER V.

INCIDENTAL MOTIONS.

40. **Preliminary statement.**—Incidental motions are caused by considerations incidental to the matter pending at the time, and are consequently to be decided before the matter which gives rise to them.

They pertain to: (1) The question of consideration; (2) questions of order; (3) reading of papers; (4) withdrawal of a motion; (5) suspension of a rule; (6) the method of consideration.

41. **The question of consideration.**—Some members, when the main question is stated by the chair, may think that the assembly should not consider it at all. He accordingly rises and says: “Mr. Chairman, on that I raise the question of consideration.” The form of the question to be thereupon put without debate is: “Will the assembly consider the motion (or resolution)?” The question of consideration applies to the main question and to no other. It formerly was put as a matter of course, but of late years, if the question is not raised, the willingness of the assembly to consider the matter is assumed. The question must always be raised, if at all, before consideration has begun.

42. **Questions of order.**—Another obstacle to consideration is a point of order, which is a claim that the question cannot be considered because it conflicts with some parliamentary rule or some order of the

body. This should, strictly, take precedence of an objection to consideration, for if the question is not in order it is useless to vote that it shall be considered. When a question of order arises it interrupts the consideration of the subject out of which it arises until the question of order is disposed of. When a member thinks that the matter proposed or pending is irregular, he rises in his place and says: "Mr. Chairman, I rise to a point of order." The Chairman replies: "Mr. A will state his point of order." The presiding officer then, either with or without debate as he may himself determine, decides the point so raised. He may suggest the point of order himself, should no member raise it. An illustration of a point of order would be an objection to the consideration of a motion to amend while a motion to postpone was pending.

43. **Appeals.**—Inasmuch as appeals are most frequently taken from rulings on points of order, their consideration follows. When a member appeals from a ruling of the chair, the presiding officer should insist upon a second before entertaining the appeal. Both the member appealing and the member seconding the appeal should, as in the case of all other motions, rise in their places and address the chair. The form is: "Mr. Chairman, I respectfully appeal from the ruling of the chair." After the appeal is seconded, the chairman says: "The chair rules that (stating the ruling). Mr. A appeals from this decision of the chair. The question is: Shall the decision of the chair stand? Are you ready for the question?" The question is debatable and the de

te is generally participated in by the presiding officer standing in his place. In all other cases, the presiding officer when taking part in debate should rise from the floor, having called someone to take the chair. All questions of order arising under an appeal are decided peremptorily by the chair. The presiding officer, when a member of an assembly, may vote upon the appeal, and, in case of a tie, the ruling stands in spite of the form in which the question is put. A decision of the chair always stands until set aside by a majority vote.

44. **The reading of papers.**—Recurring now to incidental motions, the next relates to the reading of papers. When a paper embodies a matter upon which the assembly is to take final action, any member may have it read for his information. As to other papers, however, it is not the right of a member to read them himself or to have them read without leave of the assembly. This, being incidental to the matter under debate, must be decided first.

45. **Withdrawal of a motion.**—In the absence of special rule to the contrary a motion, when made and submitted by the chair so as to be in possession of the assembly, cannot be withdrawn or modified by the maker without leave of the house, obtained upon a motion which is, of course, incidental to the matter.

46. **Suspension of a rule.**—When any desired proceeding is prohibited by some special rule, it is necessary to move for the suspension of the interfering rule. This motion is consequently incidental to that proceeding and supersedes it until decided.

47. **The method of consideration.**—The last incidental motion to be discussed is a motion as to the method of consideration. This motion is made only when there have been no general rules established on the subject. Where these exist no exception can be grafted upon them except in one of the ways already indicated.

48. **General remarks.**—Incidental motions, being in order at almost any stage and relating as they do to limitation of debate and order of action, give the body complete control of its business. They are generally adjusted by agreement and at any rate should be decided after brief debate. As to their rank among themselves, a question of order takes precedence of all the others. The other incidental motions have no precedence over one another; each must be decided before another can be put or any action taken on the question pending when the motion was made. Incidental motions are not debatable or amendable except motions relative to the method of consideration which are amendable and briefly debatable, and questions of order, which may be debated if the presiding officer so requests.

CHAPTER VI.

SPECIAL MOTIONS.

49. **Reconsideration.**—There is one more motion, a class by itself, a knowledge of the rules applicable to which is necessary to a working knowledge of parliamentary law. That is the motion for reconsideration. A motion to reconsider, if allowed, opens the entire question for further action precisely as it stood just before the vote reconsidered was taken, and, when no further discussion or alteration is desired, the presiding officer must again put the question to vote. Any former order as to the method of taking the vote is no longer in force.

If it is proposed to change any action taken prior to the final vote upon a question, the votes which have been taken, beginning with the final one, must be reconsidered in reverse order until the one desired to be changed is reached. If, for instance, the vote on an amendment, whether affirmative or negative, is unsatisfactory, the vote on the main question must first be reconsidered and then the unsatisfactory vote on the amendment.

A motion to reconsider is applicable to almost all votes. The principal exceptions are a vote to adjourn, to lay on the table, for suspension of the rules, and to reconsider, with sometimes, by special rule, a vote ordering the previous question. The same vote can be reconsidered but once.

A motion to reconsider is not in order after some action has been taken by the assembly under the vote proposed to be reconsidered. For instance, a motion to commit cannot be reconsidered after the papers have been delivered to the committee. A motion to reconsider must be made during the day of the vote sought to be reconsidered. It may be made while a member has the floor and noted on the record to be acted upon at such subsequent time as the business of the assembly permits, even upon a subsequent day.

Under the customary modern practice only some member who was in the prevailing vote, whether that was affirmative or negative, may move to reconsider. The presiding officer may inquire of the mover whether he was in the prevailing vote. A motion to reconsider is debatable whenever the motion on which the vote in question was taken is debatable, otherwise not. Accordingly, a debatable matter may be debated three times. Once before the first vote, once again on the motion to reconsider that vote, and the third time after the vote has been reconsidered.

50. Motions on disagreeing action.—Brief mention should be made of certain motions—three in number—which are peculiar to the situation created by disagreeing action between the two houses of a legislature. When one house passes a bill it is transmitted to the other. If the second body takes different action upon it the bill comes back to the first house with a memorandum of the disagreeing action. Then either one of three motions is in order. If the

st house desires to change its original action and agree with the other house it votes "to recede and incur." If it desires to try to persuade the other house to agree with it the motion is "to insist and ask for a committee of conference." If it proposes to stand pat, whatever happens, it votes "to adhere," and that kills the bill, unless the other house backs down.

CHAPTER VII.

SUNDRY GENERAL RULES.

51. **Rules enumerated.**—A few general rules for one's guidance when participating in deliberative assemblies are as follows:

(1) It is most unparliamentary to make a principal motion and a subsidiary one relating to it at the same time, as, for instance, to move the adoption of a resolution and the previous question upon its adoption both together.

(2) When a member has obtained the floor, he cannot be interrupted except, generally speaking, by a call to order, a question of privilege, a motion to proceed to the order of the day, and a motion to reconsider to be noted on the record. Unless the disposition of these motions disposes of the speaker also, he may proceed when they are finished. Calls of "order," "order," or "question," "question," made by members from their seats, are always disorderly and should be rebuked by the presiding officer. A member can properly take no part in the proceedings from his seat, except to vote—a rule far too seldom observed.

(3) The last word is frequently conceded to the proposer of the pending question as a privilege, but although often claimed, is not a right.

(4) The member speaking should always address his remarks to the presiding officer and not to his

ellow members, and speeches should follow, not precede, the motions to which they refer.

(5) A member having the floor may yield it for question addressed to himself without losing his right to continue, and likewise when he yields for motion to adjourn, or to take a recess, or that the Committee of the whole rise, he is entitled to resume it once if either motion be lost, and if the motion be carried he is entitled to resume when the subject is next before the body. But when he yields the floor for any other purpose, he yields it for all.

(6) Members should refrain from referring to each other by name. Some equivalent expression like "the last speaker," or "the gentleman from A," should always be used, if possible. The official, and not the personal, character of the party addressed must be kept in view.

(7) A member's remarks must always be pertinent to the subject under discussion, otherwise he may be called to order.

(8) While the nature or consequences of a pending measure may be strongly criticized, it is not permissible to speak in similar terms of a measure already passed, for that would be a reflection upon the assembly, and, similarly, while a pending measure may be roundly abused, those who favor it may never be.

(9) The general rule is that no member shall speak more than once to the same question, except by leave of the assembly; but he may speak the second time to clear a matter of fact or explain an ambiguity in some material part of his speech.

CHAPTER VIII.

COMMITTEES.

52. **Membership.**—The member who makes the motion for the appointment of a committee is not entitled to be chairman or even a member of it. That he is so entitled has, however, come to be so generally believed that not to appoint him is likely to be considered an act of discourtesy. The person first named in announcing or electing a committee is usually considered to be chairman, but the committee may disregard that and choose its own chairman unless the assembly otherwise directs.

53. **The report.**—“A majority report” is a misnomer. There can be but two reports, “the report of the committee” and “a minority report.” This latter can technically be presented only by leave of the assembly, which is seldom refused. A report can only be agreed to in a meeting of the committee. It cannot be made up from opinions of members obtained outside. It should always be the result of joint discussion.

54. **Treatment of the report.**—The “reception” of a report adopts nothing, but ipso facto, discharges the committee, unless it be a standing one. The “reception” of a report merely admits its subject matter to the body for consideration in the light of the report. The report is simply a vehicle in which the real matter for action is brought back to

the assembly and the question is upon that matter and not upon the vehicle.

55. **Committee of the whole.**—Deliberative assemblies frequently resolve themselves into the committee of the whole in order that some specified subject may be more informally and fully discussed than it can be in the assembly itself. This is due to the fact that the ordinary rules of parliamentary law are greatly relaxed in committee of the whole, and while a vote there affords a test of strength, it does not bind the assembly. The course of procedure is substantially as follows: A member moves that the assembly resolve itself into the committee of the whole to consider some pending matter specified in his motion. If this be voted, the presiding officer names the person who shall act as chairman and himself leaves the chair. If it is desired to object to the chairman so named, the objection should be made before the presiding officer leaves the chair. In practice objection is never made. The clerk of the assembly still acts, but makes no record. He merely keeps such memoranda as will assist the chairman. The report made by the chairman to the assembly is the record of the committee and is preserved in the journal of the assembly.

The quorum of the committee is the same as that of the assembly unless the assembly otherwise orders. If it is found that a quorum is not present the fact is reported at once to the house. The committee cannot limit debate. Each member may speak as often as he can get the floor and as long as he chooses, subject to the reasonable control of

the chairman. Only the assembly, acting through the chairman, can limit debate. The yeas and nays cannot be called. The only subsidiary motion permissible in committee of the whole is to amend. The committee cannot adjourn. The motion which, when carried, terminates its session is "that the committee do now rise." Thereupon the committee rises and the regular presiding officer takes the chair. If the consideration of the business entrusted to it has not been finished, the motion is, "that the committee do now rise, report progress, and ask leave to sit again." After the presiding officer has resumed the chair and the chairman of the committee has gone to his seat in the assembly, he rises, addresses the presiding officer, and says: "Mr. Speaker (or whatever title is appropriate), I am instructed by the committee of the whole to report that, having had the business committed to it under consideration, it has arrived at no conclusion with reference thereto and asks leave to sit again."

If a conclusion has been reached, the committee instructs its chairman so to report, and then instead of the foregoing the chairman says: "Mr. Speaker, I am instructed by the committee of the whole to report that it has finished its consideration of the matter committed to it, and I am ready to make known its conclusions whenever the house shall think proper." The presiding officer generally replies: "Please proceed," and the chairman then reports the action of the committee, and the clerk enters it on the minutes of the house.

BIBLIOGRAPHY.

As a text book upon the Common Parliamentary Law *Cushing's* treatise is standard throughout the United States, and an abridged edition of this with notes by *Albert S. Bolles* is admirable. *Roberts'* and *Reed's* manuals are convenient and valuable.

Those who are curious to delve in the subsoil of the subject are referred to the works of *Hackwill*, *Scobell*, *Elsyng*, *Pettyt* and *Hatsell*, to *Jefferson's* manual already mentioned and to the exhaustive scientific treatise of *Mr. May*.

QUIZ QUESTIONS

PARLIAMENTARY LAW

(The numbers refer to the numbered sections in the text.)

1. What are the source and origin of parliamentary law?
2. What two kinds of assemblies are there and how do they differ as to the right of membership?
3. State the proper method of organizing deliberative bodies. To whom is control of the same entrusted?
4. A asserts that he has been elected a member of the board of county commissioners, and demands admission to their sessions. What credentials must he produce in order to establish his right?
5. A deliberative assembly announces that it will be governed with regard to the order of its proceeding by Roberts' Rules of Order. May it modify these rules at all?
6. (a) What is meant by a quorum? (b) Suppose that the provision of law by which the deliberative body acquires its powers, requires that a majority of all its members be present before it may transact business. May it act in the absence of such majority?
7. Jones, a director in a corporation, upon arriving at the meeting place of the directors, learns that the presiding officer has violated the rules prescribing the regular order of business, and has disposed of a matter in which Jones was interested, out of its turn. Has Jones any just cause of complaint?
8. In the absence of by-laws or other specific regulations, how is the will of the assembly to be ascertained?
9. Assume that the presiding officer of a deliberative body desires to make an argument upon one side or the other of a question. What ought he to do?

10. In choosing a clerk or recording officer what qualifications should be considered?
11. State in a general way the duty of the recording officer with reference to keeping a record of the proceedings.
12. One member of a deliberative assembly is addressing the chair. Under what circumstances may another member interrupt him?
13. Suppose a member of a deliberative body is expelled. What remedy, if any, has he to gain reinstatement?
14. A makes a motion, B seconds said motion. Upon its being inquired into, it is ascertained that B is not a duly qualified member of the body. Ought the chair to entertain A's motion?
15. To what extent, if at all, may the chairman of his own motion bring the consideration of new business before the assembly?
16. When a member desires to be heard in any matter how should he proceed and what ought the presiding officer to do in recognition of such proceedings?
17. Upon being recognized by the chair what should the member next do in order to bring the matter in which he is interested before the assembly?
18. Who may present petitions and in what way should they be called to the attention of those who are to pass upon them?
19. What is the necessity of, and the reason for, a second to a motion?
20. At what point in the proceedings may the propriety of a motion be questioned or its debate be entered upon?
21. How should the vote on a motion or resolution be taken and recorded?
22. How should the chairman proceed to bring the matter before the body for deliberation and determination?
23. Under what circumstances, if at all, is the presiding officer permitted to cast a ballot?
24. A motion is regularly before the house. What other motions, if any, may properly be entertained before proceeding to its consideration?
25. Name the usual subsidiary motions and state their several uses and purposes.

1. What is the effect of a motion properly made and carried to lay the principal motion or resolution on the table?
2. The principal motion is before the assembly; subsidiary motions have been made; a member desires a ruling on the original motion. What should he do?
3. When may a motion to postpone indefinitely be interposed and is such a motion ever debatable?
4. What is the object of a motion to postpone a matter in question to a definite time?
5. The chairman desires to submit the matter to a committee; there is no standing committee for such purpose. May he appoint a special committee without definite authority from the assembly?
6. By what two proceedings may defects in a motion or resolution be corrected?
7. An amendment to the main proposition is offered; an amendment to this amendment is offered. Ought the chairman to consider the latter before the former has been disposed of?
8. Name, define and classify privileged motions. Under what circumstances are such motions available?
9. Under what circumstances is a motion to adjourn proper, and when, if at all, is it open to debate?
10. Suppose a motion to adjourn to a special time and place is made. Is such motion debatable, and if so, in what particular?
11. Under what circumstances is a motion to take a recess privileged and when is it open to debate?
12. Into what two general classes may questions of privilege be divided and what is the order of preference between them?
13. Who decides whether a question suggested by a member is privileged or not?
14. A member of an assembly is discussing on the floor some matter extrinsic to the regular order of business; motion is made to take up instead the regular order of business. Should such motion be entertained?
15. Classify incidental motions; state their use and purpose.
16. A question is stated; a member desires to object to its consideration on the ground that decision thereon is outside the purposes of the assembly. May he do so, and if so, in what manner?

42. When may a member raise the question of order?
43. A appeals from the ruling of the chair. Who ultimately decides the appeal, and to what extent, if at all, may the chairman participate in the discussion thereof?
44. Under what circumstances may a member demand the reading of papers bearing upon the question in issue?
45. A member makes a motion and later on desires to withdraw it. How should he proceed and what should the chairman do?
46. A matter is proposed for determination contrary to some established rule of procedure. If it is otherwise a proper matter for consideration, how may this objection be overcome?
47. What incidental motions give an assembly complete control of its business?
48. State which incidental motions take precedence over the others.
49. What is meant by a vote to reconsider, and what matters may be taken up for discussion by virtue of such motion?
50. Where it is necessary for two deliberative bodies to take action upon the same matter before the same can be fully determined, and a disagreement arises between them, what is the proper course of procedure?
51. A member having been recognized by the chair, under what circumstances may he properly be interrupted?
52. A committee is appointed; the chairman of the body appoints a chairman of such committee. Is the committee bound to abide by such appointment?
53. In what way should the committee report the result of its deliberations to the body? Is it necessary that its conclusion be unanimous?
54. When the committee reports, what action should next be taken?
55. Under what circumstances is it proper for a deliberative body to resolve itself into a committee of the whole? State in a general way how such committee should proceed.

INDEX

*(The Roman numerals refer to the part numbers in this volume;
the Arabic numerals to the page numbers.)*

- ascending Debtor,
 - defined, II, 7, 8.
- attachment of property of, II, 7, 8. See also Attachment; Debtor.
 - service by publication, II, 27.
- abstract of Title, constructive notice by reference in the chain of title,
 - I, 195, 196.
- accident, doctrines of equity relating to, I, 164-166.
- accounting,
 - by trustee,
 - beneficiary right to, I, 65, 99.
 - equity may require, I, 99.
- equity jurisdiction, origin of, I, 98-100.
- in equity, I, 95, 98-100.
 - in actions for partition or foreclosure of land, I, 99.
 - in actions for redemption of mortgage, I, 99.
 - in partnership insolvency actions, I, 99.
 - of past waste in injunction suit, I, 46.
 - of profits in infringement of patent suits, I, 58, 99.
- in law, I, 98, 99.
- plaintiff cannot sue in equity alone for, I, 45.
- when legal remedy is inadequate, I, 99, 100.
- actions,
 - at law, injunction against, equitable defenses, I, 65, 66.
 - in equity,
 - concurrent jurisdiction, I, 7, 8.
 - court does not scrutinize the whole past career of the plaintiff, I, 218.
 - exclusive jurisdiction, I, 7, 8.

Actions—Continued

- judgments as bar to, when, III, 36-42.
- laches, I, 219.
- multiplicity of suits. See Multiplicity of Suits.
- splitting cause of, effect of, III, 37, 38.
- splitting the grounds of recovery and defense, effect of, III, 38-40.
- statutory, to quiet title, I, 91.

Adjournment,

- of deliberative assemblies,
 - effect of, on pending business, IV, 28.
 - equivalent to dissolution, when, IV, 28.
 - motion to adjourn, IV, 27, 28.
 - cannot be amended or debated, when, IV, 28.
 - when in order, IV, 27.

Administration of Estates, jurisdiction of equity over, I, 139-142.**Administrator,**

- attachment of property by, or of property which is in hands of, II, 4, 5.
- garnishment of, exemption from, II, 43, 50.

Adoption of Children, application of naturalization law to adoption of alien children, V, 37.**Affidavit,**

- in application for garnishment proceedings, II, 56, 57, 59.
 - annexed to summons, II, 59.
 - any number of garnishees may be embraced in one, II, 57.
 - contents of, II, 56, 57.
 - necessity of, II, 56.
 - reciting of the amount and character of the indebtedness in the, II, 57.
 - swearing to the, II, 57.
 - under statutes, II, 57.
- in application for the writ of attachment, II, 13-16.
 - alleging grounds of attachment, II, 15, 16.
 - amendment to, II, 35.
 - amount of indebtedness to be stated, reasons for, II, 14, 15.
 - by corporation, or by an officer of the corporation, II, 13.
 - contents of, II, 14, 16.
 - defective affidavit may be cured by amendment, II, 16.
 - filing of, II, 13.
 - necessary for jurisdiction, II, 13, 14.
 - pleading to, by defendant, II, 33.
 - swearing to, II, 13.

Agency. See Principal and Agent.**Aliens,**

- attachment of property by, II, 4.
- naturalization of,
 - by special acts of Congress, V, 9.
 - laws not extended to all, V, 13, 14.

Aliens, naturalization of—*Continued*

- special provisions, military service, V, 17, 18
- steps required, V, 20-28.
 - affidavit of witnesses, V, 23, 24.
 - filing of petition, V, 24, 25.
 - hearing, V, 25-28.
 - petition, V, 20-23.
- right of, to hold real or personal property, V, 12.

Answer,

- of garnishee in garnishment proceedings, II, 61-65.
 - before justice of the peace, II, 64.
 - duty of garnishee to answer, II, 61.
 - effect of, II, 64, 65.
 - equivocations, effect of, II, 62.
 - evasive answer treated as a nullity, II, 62.
 - failure to answer, effect of, II, 61.
 - filing of answer, II, 61.
 - information received from others should be included in, II, 62.
 - interrogatories by plaintiff,
 - garnishee must answer, II, 61, 62.
 - must be confined to such matters as under the law necessarily involve the garnishee's liability, II, 63.
 - protection from answering impertinent questions, II, 63.
 - refusing or neglect to answer, effect of, II, 66, 67.
 - entering of conditional judgment, II, 60.
 - may be treated as contempt, II, 66.
 - scire facias, issuance of writ of, II, 66, 67.
 - when a corporation, II, 63.

Assemblies,

- as committee of the whole, IV, 41, 42.
- committees of, IV, 40-42. See also Committees.
- kinds of, IV, 2, 3.
- meeting place of, control of, IV, 5.
- members of, IV, 2, 3, 9, 10, 38, 39. See also Members.
- motions, procedure on, in, IV, 13, 15-38. See also Motions.
- officers of, IV, 3-5, 8.
 - choosing of, IV, 4, 5.
 - presiding officers, IV, 3, 8.
 - recording officer, IV, 3, 8.
- order of business, IV, 5, 7, 11-18. See also Parliamentary Law.
- organization of, IV, 2-5.
- prescribed by law, IV, 2.
- presiding officer, IV, 3, 8.
- pursuant to the call by a competent authority, IV, 2, 3.
- voluntary, IV, 2.

Assessors, powers of, III, 9.

Assets, discovery of, in equity, I, 95.

Assignee, attachment of property by, II, 4.

Assignments,

equitable interests arising from, I, 161.

of chose in action, priority, I, 210, 211.

of contracts, I, 163.

of debt, vendor's lien in equity, I, 40, 41.

of equitable liens, I, 157-163.

of future interests in land, I, 161, 162.

of future wages, I, 163.

of mortgages, I, 149, 150.

Asylums, gift to, in trust, a charitable trust, I, 125.

Attachment,

defined, II, 1.

against the person, II, 2. See also Capias, Writ of.
garnishment,

distinguished from, II, 45.

in aid of attachment, II, 45, 46.

of goods in hands of receiver, as contempt, I, 110.

of property, II, 2, 43.

affidavit, II, 13-16, 35. See also Affidavit.

allowed in what classes of actions, II, 3, 4.

amendments to writ, II, 21, 22, 34-38.

application for writ, II, 13-16.

at common law unknown, II, 2.

"attachment in aid," II, 13.

bonds, II, 16-19, 24-26. See also Bonds.

called an extraordinary proceeding, II, 6.

defendant,

defense of, effect of, II, 32, 33.

interpleading by third party, effect of, II, 33, 34.

non-appearance of,

effect of, II, 31, 32.

delay in execution of writ, effect of, on liability of officer, II, 20.

dissolution of,

as to others than the defendant, II, 40, 41.

defects in plaintiff's proceedings, II, 38, 39.

effect of, II, 41, 42.

grounds for, II, 38-42.

insufficiency of bond, II, 38.

property exempt from execution, II, 38.

substantial defects appearing on the face of writ, II, 39.

upon death of the defendant, when, II, 39.

when debtor's property is in the hands of bankruptcy court, II, 39.

duty of officer receiving writ, II, 20, 21.

appraisement of the property, II, 21.

possession of property, to secure, II, 40.

return of writ, II, 21, 22.

- attachment, of property, duty of officer receiving writ—*Continued*
 - under it officer may levy on defendant's real or personal property, II, 20.
- enforcement of, II, 2.
- excessive levies, how guarded against, II, 21.
- for,
 - fraud in contracting the debt, II, 10-12.
 - fraudulent disposition of property by debtor, II, 8, 10.
 - transfer of real property in fraud of creditors, II, 8, 9.
- in England and the United States, II, 2.
- in hands of administrator, executor, or guardian, II, 5.
- issuance of writ, II, 20, 21.
- nature of, II, 19, 20.
- not allowed against,
 - municipal corporation, receiver, or trustee, II, 5.
- of,
 - absconding debtors, II, 7, 8.
 - corporations, II, 5.
 - foreign corporations, II, 5.
 - married woman, II, 5.
 - non-resident debtors, II, 6, 7.
 - partner, II, 4.
 - persons,
 - jointly liable, II, 4.
 - who stand in the relation of debtor to the plaintiff, II, 4.
- on account of intended removal of debtor's property from the state, II, 10.
- "original attachment," explained, II, 13.
- parties,
 - against whom remedy may be brought, II, 4, 5.
 - who may bring remedy, II, 3, 4.
- pleadings in, II, 31.
- possession of court officer of attached property, II, 22-24, 40.
- preservation of attached property against loss, II, 23.
- quashing the writ, II, 21, 22.
- removal of property when it is subject to attachment, pursuit of, II, 22, 23.
- return of writ, II, 21, 22, 37.
 - amendments to, II, 37.
 - indorsement setting forth manner of execution, II, 21.
- sale of attached property,
 - after judgment, II, 42.
 - duty of officer as to sale, II, 42, 43.
 - object and procedure, II, 23, 24.
- service of writ upon defendant, II, 27-31. See also Process, service of.
 - actual service, II, 27.
 - at domicile of defendant, II, 27.

Attachment, of property, service of writ upon defendant—Continued

- by publication, II, 27-31.
- constructive service, II, 28.
- personal service, II, 27.
- the writ, II, 19, 36, 37.
- amendment of, II, 36, 37.
- origin of, II, 2.

Attorney and Client,

- non-disclosure by attorney, I, 168.
- when relation creates a constructive trust in favor of client, I, 128.

Auctions, interpleader, bill of, when will lie, I, 104.**Auxiliary Jurisdiction,**

- discovery, bill of, I, 114, 115.
- effect of statutes, I, 115.
- suits for examination of witnesses, I, 115, 116.

Bailment, interpleader, bill of, when will lie, I, 104-106.**Bankruptcy, appointment of receiver, I, 107.****Beneficiary,**

- equitable interests of, I, 123.
- remedies of,
 - against the trustee, I, 65, 99.
 - to follow trust property into its substitute, I, 129.
- may compel the performance or non-performance of an act, I, 122.

Bibliography,

- attachment and garnishment, II, 68.
- equitable rights and remedies, I, 227-228.
- judgments and executions, III, 67, 68.
- naturalization, V, 38.
- parliamentary law, IV, 43.

Bills and Notes,

- fraudulent transfer, injunction against, I, 69, 70.
- garnishment of holder of promissory notes, II, 53, 54.
- holder of negotiable instrument, notice by *lis pendens*, I, 195.
- promissory note secured by mortgage, I, 150.

Bills of Peace, I, 82-88. See also Multiplicity of Suits.**Bona Fide Purchaser,**

- defense, equitable, I, 205.
- how question may arise, I, 205, 206.
- is a quitclaim grantee a, I, 204.
- the payment, I, 202, 203.
- valuable consideration, I, 201, 202.

Bonds,

- in attachment proceedings, II, 16-19, 24-26, 36.
- amendment of, II, 36.
- “bail bond” explained, II, 25, 26.

Bonds, in attachment proceedings—Continued

- before obtaining attachment, II, 16-19.
 - approving of, II, 17.
 - execution of, II, 18.
 - form of, II, 16, 17.
 - insufficient bond may be increased, II, 19.
 - required in most states, II, 16.
 - runs to the state under some statutes, II, 17.
 - sufficiency of, II, 16.
 - surety on, II, 18, 19.
 - terms of, II, 16.
 - the obligee, II, 17, 18.
 - where attachment is sued out against all of several defendants, II, 17.
- by defendant in order to retain possession of attached property, II, 24, 25.
 - discharged, when, II, 25.
 - objects of, II, 25.
 - permitted in some states, II, 24.
- dissolution bond, II, 25, 26.
 - effect of, II, 25.
 - object of, II, 25, 26.
- "forthcoming bond" explained, II, 24, 25.
- purpose of, II, 36.
- in garnishment proceedings, II, 58.
 - statutory requirements, II, 58.
 - where proceedings are begun,
 - after recovery of judgment, II, 58.
 - before recovery of judgment, VI, 58.

Boycott, injunction against, I, 60, 61.

Building,

- changing, destroying or removing, as acts of waste, I, 44, 45.
- contracts, specific performance of, I, 15-17.

Burmese, cannot be naturalized, V, 14.

Cancellation,

- of instruments, I, 69-71.
 - equitable estoppel, application of, I, 179.
 - for fraud, bona fide purchaser, I, 206.

Capias Ad Respondendum, III, 57.

Capias Ad Satisfaciendum, III, 57.

Capias, Writ of,

- defined, II, 1.
 - as an execution, III, 57, 58.
 - as a process, III, 57.

Chancellor,

- discretion of the, I, 6.
- history, I, 6.

Chancery. See Equity.

Charitable Trusts,

defined, I, 123, 124.

what purposes are charitable, I, 124, 125.

charities, so called, I, 125.

education, I, 125.

eleemosynary purposes, I, 125.

religious, I, 124, 125.

Chinese, cannot be naturalized, V, 14.

Choses in Action,

assignment of,

priority, I, 210, 211.

Citizenship,

American woman married to a foreigner, status as to, V, 34.

desertion from army or navy forfeits right to, V, 2.

Classification of Equity, I, 7, 8.

Clerk, of deliberative assemblies, IV, 3, 8.

Clerks of Court, funds held by, not subject to garnishment, II, 50.

Cloud on Title,

defined, I, 88.

failure to bring ejectment a, I, 88.

instrument invalid on its face no, I, 89, 90.

plaintiff's possession, I, 88, 89.

statutory suit to quiet title, I, 91.

Committees,

of deliberative assemblies, IV, 40, 42.

chairman of, IV, 40.

committee of the whole, IV, 41, 42.

debate cannot be limited, IV, 41.

purpose of, IV, 41.

quorum of, IV, 41.

report of action of the committee, IV, 42.

membership committee, IV, 40.

report of, IV, 40, 41.

majority report, IV, 40.

minority report, IV, 40.

reception of, IV, 40.

treatment of the report, IV, 40, 41.

Common Law,

arbitrariness and harshness of, I, 2.

courts, modern consolidation of law and equity courts, I, 4, 5.

early English courts, I, 2.

rules of, necessarily precise and definite, I, 6.

Conservator, attachment of property by, II, 4.

Consideration,

illegal, in equity, I, 69.

necessary for specific performance, I, 19, 20.

- Institutional Law**, naturalization of aliens, powers, and limitations.
 See Naturalization.
- Constructive Trusts**,
 creation of,
 by relation of,
 attorney and client, I, 128.
 partners, I, 128.
 principal and agent, I, 128.
- Defense to**, bona fide purchaser, I, 206.
- Equitable estoppel**, application of, I, 179.
- Sometimes called**,
 trusts ex maleficio, I, 129.
- Contempt of court**, in equity, I, 9, 61, 110, 111.
- Contract**,
 action to set aside in equity, I, 174, 175.
- Breach of**,
 no remedy in equity when legal remedy is adequate, I, 13.
- Compromise of rights**, equity will not set aside because of mistake,
 I, 80, 81.
- Concealment and non-disclosure in equity**, I, 167, 168.
- Consideration**,
 illegality in equity, I, 69.
 necessity of, for specific performance, I, 19, 20.
- For personal services**, specific performance, I, 15-19.
- Mistake in the formation and subject matter of**, I, 77-78.
 as to party's existing rights, I, 79, 80.
 unilateral in making, rescission in equity, I, 75, 76.
- Mutuality of equitable remedies**, I, 24-26.
- Negative injunction against breach of**, I, 17, 18.
- Non-performance of**, due to accident, in law and equity, I, 165.
- Not to engage in business or profession within certain area**, specific performance, I, 18.
- Obtained by fraud**, cancellation of, in equity, I, 70.
- Of land**, secured under concealment of facts, I, 20, 21.
- Of married women**, in equity, I, 136.
- Of persons or corporations in hands of receivers**, I, 112.
- Payments**, future assignments of, in equity, I, 163.
- Penalty for non-performance**, relief in equity, I, 180.
- Rescission**, when, for mutual mistake, in equity, I, 73, 74.
- Specific performance of**, I, 12-43.
- Time**, how made of the essence, specific performance, I, 28, 29.
- Time**, not generally of the essence, specific performance, I, 27, 28.
- Under seal**,
 not enforceable in equity, I, 19, 222.
 under early English procedure, I, 3.
- Written**, injunction against transfer of instrument pending suit, I, 65.
- Contribution**, right of surety to, I, 98.

Conversion,

equitable, I, 138, 139.

reconversion in equity, I, 139.

trespass to personal property, I, 51.

Conveyances. See Deed.**Copyright,** infringement of, injunction against, I, 58, 59.**Corporations,**

attachment of property by, or of property held by, II, 4, 5.

directors, when quasi-trustees, I, 133, 134.

equity without statutory authority has no power to dissolve, I, 110.

garnishment of, II, 46.

receivers of, I, 108-110.

service of process on, III, 21.

stockholders' suits in equity against directors, I, 133, 134.

Counterclaim. See Set-Off and Counterclaim.**County Board of Supervisors,** power of, to take testimony, swear witnesses and punish for contempt, III, 9.**Courts,**

defined, III, 6.

adjournment of, III, 11.

sine die, III, 11.

vacation distinguished from, III, 11.

cannot be held on Sunday or certain holidays, III, 10.

created by law, III, 6.

judgment of, III, 1-55. See Judgments.

jurisdiction of, III, 13, 14. See also Jurisdiction, of courts.

naturalization by, authorized, V, 13.

procedure in court, V, 20-32.

duties of clerk, V, 28, 29.

fees, V, 29.

nature and essentials of, III, 6-9.

of equity,

abolished as a distinct tribunal in England, I, 4.

distinct in federal and state courts, I, 4.

"equity follows the law," I, 214.

modern consolidation with law courts, I, 4, 5.

origin and rise of equity jurisdiction, I, 3, 4.

to supplement defects of law courts, I, 12.

where separate from law courts, I, 4, 5.

why needed, I, 2, 3.

will not employ their remedies when remedy at law is adequate,
I, 12, 13.

officers of,

de facto officer, judgment of, effect of, III, 10.

necessity for, III, 10.

qualifications of, III, 11.

ts—Continued

- law,
- adoption of equitable principles, I, 2.
- history of early English, I, 2, 3.
- organization of, III, 9, 10.
- power of,
- to try cases and give judgment, III, 9, 13, 16.
 - depends on law defining powers and not on facts, III, 14-16.
 - jurisdiction, III, 13, 14. See also Jurisdiction, of courts.
- necess of, III, 11.
- records,
 - are required to be kept by, III, 52.
 - as evidence of the facts of the controversy, III, 52.
 - record of a judgment as prima facie evidence against strangers to an action, III, 52.
- setting of,
 - place of, III, 12, 13.
 - terms of, III, 10, 11.
 - how reckoned, III, 11.
 - time of, III, 10-12.
- unconstitutionality of act creating court, whether grounds for attacking judgment collaterally, III, 8, 9.
- vacation of, III, 11.
- editor. See Debtor and Creditor.
- attachment of property by, II, 3, 4. See also Attachment.
- editors' Suits,
 - against trustee, I, 122.
- appointment of receiver, I, 107.
- frauds, constructive in equity, I, 166.
- purpose of, I, 95, 96.
 - discovery of assets, I, 95.
 - interests of debtor not subject to execution at law, I, 96.
 - to set aside fraudulent conveyance, I, 96.
- me, naturalization proceedings, offenses in connection with, V, 32.
- ss-Claims. See Set-Off and Counterclaim.
- tesy, of husband in wife's equitable interests, I, 123.
- images,
 - awarded by courts of law, I, 12.
 - equity seldom awards, alone, I, 226.
 - legal remedy of, I, 8.
 - liquidated, valid in law and equity, I, 181.
 - penalties and liquidated, relief in equity, I, 180-182.
- Bene Esse, I, 116.
- ctor,
 - absconding, attachment against property of, II, 7, 8. See also Absconding Debtor.

Debtor—Continued

attachment of property of, II, 2, 43. See also Attachment.

co-debtor, garnishment of, II, 54, 55.

creditor or stranger cannot interfere in bona fide litigation of the
II, 21.

garnishment of, as debtor of the defendant, II, 48, 51, 55.

joint garnishment of, II, 55.

non-resident, attachment of property of, II, 6, 7. See also Non-
Resident.

Debtor and Creditor,

action in equity to reach interests of debtor not subject to execution
at law, I, 96.

Decree, defined, III, 1, 2. See also Judgments.

Deed,

as security of mortgage, I, 148.

cloud on title, I, 88-91.

conveyance by court officer in equity, I, 11.

conveyance of mortgaged premises, I, 148, 149.

mistake in legal phraseology, reformation allowed in equity, I, 81.

recording, constructive notice by, I, 196-198.

rights of parties in equity, I, 9.

title, chain of, constructive notice by reference in, I, 195, 196.

when treated as mortgage, I, 147, 148.

Defendant, right of, in garnishment proceedings, II, 65, 66.

Defenses, to garnishment proceedings, II, 64, 65.

Deliberative Assemblies, parliamentary rules of, IV, 1-43. See also Par-
liamentary Law.

Descent and Distribution,

cestuis que trustent, I, 123.

rule of, "equity follows the law," I, 214.

Discovery,

bill of, I, 114, 115.

of assets in equity, I, 95.

under recent statutes, bill in equity unnecessary, I, 115.

Divorce,

decree of, granted when it should not be, is erroneous, not void, III, 13.

jurisdiction of courts in, III, 14, 15.

Dower,

election by widow, I, 185, 186.

no, in husband's equitable interest, I, 123.

Duress, as ground for equitable relief, I, 172.

Easements, equitable, I, 36-38.

Education, charitable trust may be created for purposes of, I, 125.

Ejectment,

equity jurisdiction, if remedy at law inadequate, I, 47.

ment—Continued

- failure to bring, a cloud on title, I, 88.
- legal remedy of, I, 8.
- tion,
- by donor who has a partial interest, I, 184, 185.
- by widow as to dower, I, 185, 186.
- doctrine of,
- in equity, I, 183-186.
- tions,
- nominating assemblies, seating of members of, IV, 3.
- nominations, IV, 3.
- temosynary Purposes, charitable trusts may be created for, I, 125.
- inent Domain, injunction against the exercise of, I, 63, 64.
- ities,
- equal, I, 209.
- inferior, I, 208.
- superior, I, 207-209.
- uity,
- definition, I, 1, 2.
- American growth of, I, 7.
- courts. See Courts, of equity.
- doctrines relating to accident, fraud, mistake, I, 164-175.
- general principles and doctrines of, I, 164-227.
- introduction, I, 1-11.
- issues of fact, tried without a jury, I, 1.
- maxims, I, 212-227.
- origin and nature, 1, 1-11.
- provisional remedies, I, 101-114.
- remedies. See Remedies.
- suits for pecuniary relief, I, 95-100.
- vagueness about, I, 6.
- uity of Redemption,
- defined, I, 143.
- mortgagor cannot bargain away right of, I, 151.
- ates,
- equitable, I, 117, 118.
- legal mortgage at common law, I, 143, 144.
- oppel,
- by judgment, III, 43-55.
- essentials, III, 44.
- example, III, 43, 44.
- extends only,
- to points actually litigated, III, 43, 44, 46, 47.
- reasons for the rule, III, 46, 47.
- judgment as a bar distinguished from, III, 43, 44.
- no estoppel,
- by judgment in rem against anyone not a party to proceeding,
- III, 54.

Estoppel, by judgment, no estoppel—Continued

- if the court that tried the first could not try the last one, III, 49.
- if two actions depend on different law, III, 48, 49.
- only as to points certainly and necessarily decided, III, 47, 48.
- parties estopped, III, 44, 45.
 - must be parties to original action, III, 44, 45.
 - the Duchess of Kingston case, III, 45.
- doctrine of laches is rested on, I, 180.
- equitable, I, 177-180.
 - application, I, 179, 180.
 - classification, I, 177-179.

Evidence, discovery, bill of, I, 114, 115.**Execution,**

- against trustee, I, 122.
- of judgment, III, 56-67.
 - defined, III, 56.
 - cannot be issued until judgment is rendered, III, 58.
 - capias, III, 57, 58. See also Capias, Writ of.
 - execution of writ, III, 61-64.
 - by duly qualified officer of the court, III, 62.
 - cannot be executed by one interested in judgment, III, 63.
 - controlling the, III, 61, 62.
 - staying the, III, 61, 62.
 - who may execute, III, 62-64.
 - fieri facias, III, 57.
 - form of, III, 60-61.
 - garnishment,
 - distinguished from, II, 44.
 - in aid of execution, II, 45, 46.
 - issuance of the writ, III, 56, 58-61.
 - after a year and a day, III, 59.
 - after judgment has become dormant, III, 59.
 - implied power of court in, III, 56.
 - only court which rendered judgment can issue, when, III, 60.
 - who may issue, III, 60.
 - writ in the hand of a sheriff not considered as having been issued, III, 58.
 - judgment should be entered on record before execution, III, 58.
 - kinds of, III, 56-58.
 - levy should be made before return day, III, 66, 67.
 - nature and effect of, III, 66, 67.
 - ought to be appropriate to the judgment to be enforced, III, 56.
 - prevention of, by death, III, 59, 60.
 - return of writ, III, 67.
 - sale of property by sheriff, III, 67.
 - sale of property in hands of receiver, void, I, 110.
 - sheriff, right of,
 - to bond of indemnity from judgment creditor, III, 64, 65.

- cution, of judgment, sheriff, right of—*Continued*
- to break in, when, III, 65, 66.
- residence, rule in regard to, III, 65, 66.
- cutor,
- attachment of property by, or of property in hands of, II, 4, 5.
- exemption of, from garnishment proceedings, II, 47, 50.
- eration, in equity to compel payment to the surety by the principal, I, 97, 98.
- patriation. See also Naturalization.
- defined and explained, V, 1-5.
- doctrine of perpetual allegiance, V, 1, 2.
- methods of, V, 3, 4.
- executive order of the President, V, 3, 4.
- aturalization, most common form of, V, 3.
- reaties recognizing, V, 2, 3.
- when, not effected, V, 4, 5.
- press Trusts,
- Definitions of I, 121, 122.
- uctive, I, 121, 122.
- reation of, I, 243, 261.
- by will, I, 140.
- charitable, I, 121.
- intentionally created by act of party, I, 120.
- of personal property, I, 125, 126.
- private, I, 121.
- public, I, 121.
- Statute of Frauds, writing necessary under the, to create a trust in land, I, 125, 126.
- Duties of trustees under, I, 130-132.
- ct,
- issue of, in equity, I, 1.
- mistake as to. See Mistake, of fact.
- uciary Relations. See Attorney and Client; Guardian and Ward; Parent and Child; Physician and Patient; Principal and Agent.
- eri Facias, Writ of,
- defined, III, 57.
- at common law, III, 57.
- under statutes sheriff may sell land belonging to the defendant, III, 57.
- Floor," The,
- defined, IV, 12, 13.
- now obtained, IV, 12, 13.
- members,
- may demand, when, IV, 14.
- recognition of, IV, 12, 13.

Foreclosure,

- of mortgage, where land has been sold in successive parcels, I, 155, 156.
- proceedings,
 - sale, title, I, 146.
 - vendor's lien, I, 40.

Foreign Corporations, attachment of property of, II, 5.**Forfeitures,**

- equity will not enforce, I, 182, 183.
- penalties and, relief in equity, I, 180.

Fraud,

- actual and constructive, in equity, I, 166, 167.
 - attachment of property of debtor,
 - for fraud in contracting a debt, II, 10, 12.
 - on account of fraudulent disposition, II, 8-10.
 - cancellation of instrument for, I, 7, 8.
 - concealment and non-disclosure in equity, I, 167, 168.
 - constructive, I, 166-169.
 - contracts upon an inadequate consideration, I, 169.
 - ratification and acquiescence, I, 174, 175.
 - transactions, illegal or against public policy, I, 169.
 - doctrines of equity relating to, I, 166, 167.
 - equitable conception of, I, 164.
 - expectant heirs and reversioners, contracts in equity voidable, I, 171, 172.
 - fiduciary relation, transaction presumed invalid for, I, 173, 174.
 - inadequacy of consideration as evidence of, I, 169, 170.
 - inferior equity because of conduct of holder, effect of notice, I, 208, 210.
 - judgment secured by, injunction against enforcement of, I, 66-68.
 - Lord Chancellor Hardwicke's classification of, I, 166, 167.
 - moral culpability in, I, 167.
 - non-disclosure by fiduciaries, I, 168, 169.
 - persons wholly or partially incompetent, I, 170, 171.
 - vacation of judgment for, III, 40.
- Fraudulent Conveyances,** creditor's suit to set aside, I, 96.
- Future Interests,** in land, assignments of, in equity, I, 161, 162.

Gaming, illegal contracts, remedy, I, 175.**Garnishment.** See also Trustee, process.

- defined, II, 44.
- administrators as a general rule are exempt from, II, 47, 50.
- answer of garnishee, II, 61-65.
 - before a justice of peace, II, 64.
 - duty of garnishee to answer, II, 61.
 - effect of, II, 64, 65.
 - equivocations, effect of, II, 62.
 - evasive answer treated as a nullity, II, 62.
 - failure to answer, effect of, II, 61.

Garnishment, answer of garnishee—Continued

filing of, II, 61.

information received from others should be included in, II, 62.

interrogatories by plaintiff,

must be confined to such matters as under the law necessarily involve the garnishee's liability, II, 63.

required to be answered, II, 61, 62.

refusing or neglecting to answer, II, 66, 67.

entering of conditional judgment, II, 66.

may be treated as contempt, II, 66.

scire facias, issuance of writ of, II, 66, 67.

when a corporation, II, 63.

application for garnishee summons, II, 56.

affidavit, II, 56, 57. See also Affidavit, in application for garnishment proceedings.

attachment distinguished from, II, 45.

bonds in, II, 58.

clerks of court, funds held by, not subject to, II, 50.

corporation may be subject to, II, 46.

defenses, II, 64, 65.

derived from a custom which at an early date obtained among merchants of London, II, 44.

enforcement, manner of, II, 56-67.

essentials to, II, 47, 48.

execution distinguished from, II, 44.

executors as a general rule are exempt from, II, 47, 50.

exemption from, II, 60.

garnishee,

defined, II, 44.

liability of,

as co-debtor, II, 54, 55.

as debtor of the defendant, II, 48, 51-55.

aim of proceeding, II, 51, 52.

conditional debts, II, 53.

debt,

must be an absolute debt, II, 53.

must be paid in money, II, 52.

need not be due, II, 53.

in effect a suit to collect debt or judgment, II, 51, 52.

rule, basis of, II, 52.

uncertain debts, II, 53.

as joint debtor, II, 55.

as partner, II, 55.

for property, II, 48-55.

in respect to property of the defendant in his possession, II, 48-51.

character of the property, II, 48.

example of, II, 48.

personal property, II, 48.

- Garnishment, garnishee, liability of, in respect to property of defendant**
—*Continued*
property must be in the actual possession of the garnishee,
II, 48, 49.
on promissory notes, II, 53, 54.
after maturity, II, 54.
before maturity, II, 53, 54.
general rule, II, 54.
in aid of attachment, II, 45-46.
distinguished from garnishment in aid of execution, II, 46.
example of, II, 45.
judgment suspended until determination of main suit, II, 46.
in aid of execution, II, 45, 46.
distinguished from garnishment in aid of attachment, II, 46.
example of, II, 45, 46.
judgment rendered against garnishee at once, II, 46.
issuance of writ, II, 58, 59.
a ministerial act, II, 59.
by plaintiff's attorney, II, 59.
issue, trial of, II, 64, 65.
as in ordinary actions, II, 64.
judgment against garnishee, II, 67.
in name of original defendant for use of the plaintiff, II, 67.
must be for a certain sum, II, 67.
kinds of, II, 45, 46.
married woman may be subject to, when, II, 47.
money in the custody of the law not subject to, II, 50, 51.
application of the doctrine, II, 50.
example of, II, 50.
in Massachusetts, II, 50.
limitation upon the operation of the doctrine, II, 51.
municipal corporations not subject to, unless expressly authorized by
statute, II, 46.
nature of remedy, II, 44-55.
notice to garnishee, II, 58, 59.
officers and agents of the government of the states and of the United
States are exempt, II, 47.
origin of, II, 44.
partakes of the nature of an injunction, II, 45.
payment of sum in court exonerates garnishee from further liability,
II, 67.
persons subject to, II, 46, 47.
public officers, funds held by, not subject to, II, 50.
purpose of, II, 44, 45.
to compel garnishee to disclose under oath whether he is indebted
to the defendant, II, 45.
receiver, money held by, not subject to, II, 50.

Enslavement—Continued

- right of action by defendant against garnishee essential, II, 47.
- exception to, II, 47, 48.
- right of defendant and others in the proceedings, II, 65, 66.
- by interpleading, II, 66.
- under statutes, II, 66.
- service of the writ, II, 59-61.
- by any person authorized to serve process, II, 59.
- endorsement of manner of service by officer, II, 61.
- on non-resident temporarily within state, II, 60.
- service by publication not sufficient, II, 60.
- service must be personal, II, 59.
- summons, II, 59-61.
- amendment of, II, 61.
- subpoena writ, II, 58, 59.
- amendment of, II, 61.
- trust funds, not subject to, II, 49, 50.
- example of, II, 49.
- uses,
- bestowed under mistake,
- of law, reformation in equity, I, 81.
- reformation in equity, I, 76, 77.
- for support of religion, I, 124.
- Guardian and Ward,**
- attachment of ward's property held by guardian, II, 5.
- fiduciary relation, I, 133, 174.
- investment of funds of ward, III, 8.
- jurisdiction of equity over infants, I, 140, 141.
- non-disclosure by guardian, I, 168.
- Hawai,** naturalization of inhabitants of, V, 14.
- capitals, gifts to, in trust, a charitable trust, I, 125.
- Husband and Wife,**
- power,
- election by widow, I, 185, 186.
- wife has no, in husband's equitable interests, I, 123.
- fiduciary relation, I, 174.
- husband as trustee of married woman's separate estate, I, 135.
- husband's curtesy in wife's equitable interests, I, 123.
- separate estate of married women. See Married Women.
- deeds, contracts of, evidence of fraud, I, 170. See also Insane Persons
- Illegal Contracts,**
- in pari delicto rule, I, 175, 176.
- parties not in pari delicto, I, 176.
- written evidence of executory, cancellation in equity, I, 176.
- legitimacy, application of naturalization law to illegitimate children,
- V, 37.
- contracts, unfair contracts of, ground for setting aside in equity, I, 171.

Indians, naturalization of, V, 14.

Infants,

contracts of, evidence of fraud, equity may set aside, I, 170.
jurisdiction of equity over, I, 140, 141.

Injunction,

defined, I, 44.

against,

action at law, equitable defenses, I, 65, 66.

boycott, I, 60, 61.

breach of trust by trustee, I, 65.

eminent domain, exercise of, I, 63, 64.

equitable waste, I, 46, 47.

illegal taxation, I, 63.

infringement of copyright, I, 58, 59.

infringement of patents, I, 56-58.

infringement of trademarks, I, 59, 60.

invalid instruments, suit on, I, 69.

judgment obtained by fraud or accident, I, 10, 66-68, 165, 227.

lectures, unauthorized publication of, I, 59.

mining, acts of waste, I, 44.

mortgagor, acts of waste of, I, 45.

municipal officers, I, 62.

municipal ordinances, illegal, I, 62.

negative contract, breach of, I, 18.

nuisance, I, 51-56.

private letters, unauthorized publication of, I, 59.

state officers, I, 62.

strikes, I, 60, 61.

transfer of instrument pending suit, I, 65.

trespass, I, 47-51.

tunnel, under plaintiff's land, I, 48.

waste, I, 44-46.

water, pollution of, I, 52.

defense of laches does not apply, I, 219.

in aid of equitable remedies, I, 64, 65.

in early English equity procedure, I, 4.

interlocutory, I, 44.

mandatory,

defined, I, 44.

in trespass, I, 50, 51.

preliminary, I, 44.

in nuisance, I, 52, 53.

in trespass, I, 49, 50.

temporary, I, 44.

In Pari Delicto, rule, I, 175, 176.

In Personam, equity acts, I, 9-11.

- Sane Persons, jurisdiction of equity over, I, 141, 142.
- struments,
- Invalid, injunction to restrain the bringing of suit on, I, 69.
- ost, suit in equity to recover amount due on, I, 165, 227.
- urance. See also Life Insurance.
- contract of, obtained by false representations, cancellation in equity,
I, 70.
- terpleader,
- efined, I, 102.
- ebt or duty, I, 102, 103.
- need of statutory changes, I, 106.
- no independent liability to either claimant, I, 105, 106.
- plaintiff a mere stakeholder, I, 103, 104.
- privity between the claimants, I, 104, 105.
- when, will not lie, I, 103-106.
- toxication, contracts made under complete intoxication voidable in
equity, I, 171.
- vestment of Trust Funds,
- uties of trustee, I, 131.
deposit in bank, trustee may, for a short time, I, 131.
- voluntary Trusts. See Constructive Trusts.
- apanese, cannot be naturalized, V, 14.
- nt Tenant, attachment of property by, II, 4.
- urnal,
- of deliberative assemblies, IV, 8, 9.
recording of proceedings in, IV, 8, 9.
- gments,
- efined, III, 1-3.
- against,
corporations, III, 21.
debtors, II, 5, 6; III, 53.
garnishees, II, 67.
non-residents, III, 17-19.
the thing, III, 22, 23.
res must be located within territorial jurisdiction of the court,
III, 22.
- amending of, III, 36, 37.
- alyzed, III, 2, 3.
- annulling of, III, 36.
- are binding until set aside by appeal or other proceedings, III, 15, 16.
- are the final disposition actually made of the case by the court, III, 2.
- as bar to future actions, III, 36-42.
cross-claims, III, 40.
judgment by estoppel distinguished from, III, 43, 44.
why a bar, III, 36.

Judgments—Continued

as estoppels, III, 43-55. See also Estoppel.

binding on,

assignees, III, 52.

person entitled to future estate yet unborn, III, 53, 54.

privies to a judgment, III, 51, 52.

strangers, III, 52-55.

judgments in personam, III, 52-54.

judgments in rem, III, 54, 55.

by confession, III, 10, 11.

collateral attack of,

judgment of a de facto officer not subject to, III, 10.

unconstitutional act creating court, whether grounds for the, III, 8, 9.

defect in issue will avoid, III, 26.

entry made by the clerk on the records of the court as to what has

been decided, distinguished from, III, 2.

execution of, III, 56-67. See also Execution, of judgment.

facts essential to jurisdiction necessary, III, 3, 4.

final,

rule as to, III, 36, 37.

exceptions to, III, 37.

finding of facts distinguished from, III, 2.

foreign,

as evidence, III, 35.

jurisdiction of court rendering judgment may be questioned, III, 35.

in rem, III, 22, 23, 54, 55.

defined, III, 54.

binding on strangers, when, III, 54, 55.

res must be within territorial jurisdiction of the court, III, 22.

without service of process on persons interested, III, 22, 23.

instructions to jury distinguished from, III, 2.

interlocutory orders entering during the progress of the trial distin-

guished from, III, 2.

jurisdiction of the court essential, III, 3-6.

illustrated, III, 4-6.

liens, priority in equity, I, 207, 208.

modifying of, III, 36, 37.

nature and essentials, III, 1-30.

not on the merits, not a bar, III, 41-42.

obedience to statutory requirements of procedure essential to the

validity of, III, 27-30.

affirmative view, III, 28, 29.

contra view, III, 29, 30.

obtained by fraud or accident,

injunction against, I, 10, 66-68, 165, 227.

not granted on ground of perjury alone, I, 68.

Elements—Continued

of,

a court, of a government not recognized by another government,
effect of, III, 7, 8.

a de facto court officer, effect of, III, 10.

an unconstitutional court, effect of, III, 8, 9.

prize courts are conclusive evidence of the facts upon which they
proceed, III, 55.

probate court sitting in a town other than county seat, void, III,
12, 13.

an action which did not state all grounds for recovery or defense,
III, 38-40.

on part of a cause of action, renders recovery on other part, impos-
sible, III, 37, 38.

on the merits, a bar, III, 41.

opinion distinguished from, III, 2.

privies to, III, 51, 52.

pro confesso, III, 10, 11.

ruling of the court on the admission of the evidence offered, distin-
guished from, III, 2.

to be conclusive upon parties must be responsive to the matter con-
troverted, III, 25.

upon matter outside of pleading will make judgment void, III, 27.

upon service of notice upon a member of defendant's family, held
insufficient, III, 17.

vacation of, III, 36, 37, 40.

during the vacation of the court under statute, III, 10.

for fraud, III, 40.

not permitted after the term at which judgment was rendered,
III, 37.

Jurisdiction,

defined, III, 3, 13.

essentials of, III, 3, 6.

illustrated, III, 4-6.

jurisdiction obtained over defendant by process, III, 5.

submission of the plaintiff to, III, 5.

that there is a court created by law organized and sitting, III, 4.

whether the facts alleged in the pleadings warrant the court in giv-
ing judgment, III, 4, 5.

whether the relief prayed for was given, III, 6.

in equity, defined and explained, III, 16.

of

courts, III, 13-30.

determined how, III, 14.

depending upon relief prayed, III, 13.

essentials of, III, 27.

in civil cases, III, 14.

in criminal cases, III, 14.

Jurisdiction, of, courts—Continued

jurisdiction, defined, III, 3, 13.

of the person, III, 16-21.

notice, service of, III, 16-21. See also Process.

voluntary appearance, III, 16.

of the question, III, 23-27.

Munday v. Vail, rule of, III, 26-27.

prayer for relief should be read to determine, III, 27.

principle illustrated, III, 23-27.

Reynolds v. Stockton, rule of, III, 23-26.

test, III, 27.

of the thing, III, 21-23.

beyond territorial jurisdiction of the court, when, III, 22.

procedure whether jurisdictional, III, 27-30.

to decide every fact necessary to determine cause before it, III, 13, 14.

equity,

concurrent, I, 7, 8.

exclusive, I, 7, 8.

once existing is not lost by the enlargement of legal jurisdiction, I, 226, 227.

once taken, extends to whole controversy, I, 46, 225, 226.

origin and rise of, I, 3, 4.

where remedy at law is inadequate, I, 224, 225.

matters of fact, determined how, III, 3.

matters of law, determined how, III, 3.

Laches,

defense of, "equity aids the vigilant, not those who slumber on their rights," I, 213, 218-220.

delay will constitute, if result is loss of evidence, I, 220.

doctrine of, is rested on estoppel, I, 180.

in nuisance cases, I, 55.

Lease, forfeiture for non-payment of rent, relief in equity, I, 182.

Legacies, origin of, in equity, I, 140. See also Wills.

Legislation,

introduction of,

bills, IV, 11.

resolutions, IV, 11.

members of legislative bodies, IV, 3.

Liens. See also Mechanics' Liens.

equitable, I, 117, 157-163.

attached to property until it comes into hands of bona fide purchaser, I, 157.

defined, I, 157.

foreclosure, defense, bona fide purchaser, I, 206.

grantor's lien after conveyance, I, 158-160.

grantor's reserved lien, I, 160.

ens, equitable—Continued

- how created, I, 157, 158.
- mortgage defective in form as, I, 158, 222.
- preference in foreclosure of mortgage to claim of unsecured creditors, I, 157.
- priority of, in England, I, 209.
- vendor's lien after conveyance, I, 158-160.
- judgment, priority in equity, I, 207-208.
- of attachment, II, 1-43. See also Attachment.
- Insurance, interpleader, bill of, when will lie, I, 103.
- Limitation of Actions. See Statute of Limitations.
- pendens, notice by, to purchaser, I, 194, 195.
- Louisiana, territory, purchase of, by treaty, inhabitants admitted to citizenship, V, 8.
- Insanity. See Insane Persons.

Married Women,

- alien, residence for naturalization purposes, V, 34.
- attachment of property of, II, 5.
- disability of, I, 135.
- garnishment of property of, when, II, 47.
- separate estates of, I, 135-138.
 - husband as trustee, I, 135.
 - power of disposition and contract, I, 136.
 - the equity to a settlement, I, 137, 138.
 - the restraint upon anticipation, I, 136, 137.
- status of alien, married to citizen of United States, V, 33, 34.
- status of American woman married to a foreigner, V, 35.

Marshalling of Assets, origin in equity, I, 140.**Taxims,**

- meaning, I, 212.
- "Equality is equity," examples illustrating, I, 213, 223, 224.
- "Equity acts in personam and not in rem," meaning and application, I, 9, 10, 213, 221.
- "Equity aids the vigilant, not those who slumber on their rights," meaning and application, laches, I, 213, 218-220.
- "Equity follows the law," meaning and application, I, 213-215.
- "Equity looks to the intent or substance rather than the form," meaning and application, I, 180, 213, 222.
- "Equity regards that as done which ought to be done," meaning and examples, I, 139, 158, 213, 222, 223.
- "Equity will not suffer a wrong without remedy," meaning, summing up the early history of equity, I, 213, 214.
- "He who comes into equity must come with clean hands," I, 213, 217, 218.
- "He who seeks equity must do equity," I, 137, 154, 212, 215-217.
- "Once a mortgage, always a mortgage," I, 151.

Maxims—Continued

“Party in equal guilt (in pari delicto) with the other party cannot have a remedy against him,” I, 175.

“Where there are equal equities, the first in order of time shall prevail,” I, 203, 209, 213.

“Where there are equal equities, the law shall prevail,” I, 206, 213.

Mechanics’ Liens, mortgage superior to, I, 207.

Members,

of deliberative assemblies, IV, 2, 3, 9, 10, 38, 39.

disorderly conduct of, IV, 9, 10.

expulsion for, IV, 10.

general rule that members shall not speak more than once, IV, 39.

remarks of, must always be pertinent to subject under discussion, IV, 39.

rights and duties of, IV, 9.

should refrain from referring to each other by name, IV, 39.

when speaking should always address presiding officer, IV, 38, 39.

who have obtained the “floor,”

cannot be interrupted except by,

a question of privilege, IV, 38.

call to order, IV, 38.

motion to proceed to the order of the day, IV, 38.

motion to reconsider, IV, 38.

may yield it, when, IV, 39.

Membership Committee, of deliberative assemblies, IV, 40.

Mines, acts of waste in mining, injunction against, I, 44.

Minutes, of deliberative assemblies, IV, 8, 9.

Misrepresentation, contract secured under, unenforceable in equity, I, 20.

Mistake,

doctrines of equity, I, 164.

of fact, I, 71-76.

in gifts, I, 76, 77.

mutual,

as to value, no rescission, I, 74, 75.

defense to specific performance, I, 21, 22.

reformation in equity, I, 71.

when rescission for, I, 73, 74.

of one party, known to the other, reformation, I, 71, 72.

unilateral, known to other party, generally no rescission or reformation, I, 76.

of law, I, 77-81.

as to party’s existing rights, I, 79, 80.

compromises as to legal rights, I, 80, 81.

equity will not grant relief, I, 77, 78.

inequitable conduct of other party, I, 79.

in gifts, I, 81.

Mistake, of law—Continued

reformation where the instrument does not express the contract,
I, 78, 79.

Monument, soldiers', a sum in trust for, a charitable trust, I, 124.

Mortgages,

as negotiable instruments, I, 150.

assignment of, I, 149, 150.

conveyance of the mortgaged premises, I, 148, 149.

deeds, when treated as, I, 147, 148.

defective in form, as equitable liens, I, 158, 222.

equity of redemption, I, 143, 144.

defined, I, 143.

mortgagor cannot bargain away right of, I, 151.

foreclosure of, I, 144.

accounting, I, 99.

by sale, I, 146, 147.

defenses, bona fide purchaser, I, 206.

suit to foreclose, appointment of receiver, I, 108.

where land has been sold in successive parcels, I, 155, 156.

forfeiture, rule of, relates to, I, 182.

relief in equity, I, 182.

injunction against waste of mortgagor, I, 45.

lien theory,

equitable, I, 157-163.

states, American, I, 145, 146.

marshalling of securities, I, 154, 155.

mortgagee,

equitable lien of, I, 145, 146.

legal title of, I, 145.

notice, constructive,

by recording, I, 196-198.

to whom record is notice, I, 198, 199.

of after-acquired property, I, 162, 163.

recorded, priority of, I, 207.

redemption,

accounting, I, 99.

stipulations limiting right of, void, I, 151.

who may redeem from the mortgage, I, 152.

subrogation of, I, 152-154.

superior lien, when, I, 114, 207, 208.

theory of,

American, I, 144, 145.

English common law, I, 143, 144.

title theory states, I, 144, 145.

Motions,

procedure on motion in deliberative assemblies,

adoption of motion, IV, 16, 17.

Motions, procedure on motion in deliberative assemblies—Continued

“Are you ready for the question?” IV, 16.

at common law, IV, 22.

debate upon motion, IV, 15.

how put, IV, 16, 17.

incidental motions, IV, 31-34.

defined, IV, 31.

classes of, IV, 31.

in order at almost any stage of the consideration of a question,
IV, 34.

not amendable or debatable, IV, 34.

precedence among, IV, 34.

motion,

for the orders of the day, IV, 30.

for the previous question, IV, 19, 21, 22.

as used in,

England, IV, 21.

United States, IV, 21.

at common law, IV, 22.

debatable in England, IV, 22.

not debatable in United States, IV, 22.

relating to,

the division of the question submitted, IV, 24.

the filling in of blanks of a measure submitted, IV, 24.

the method of consideration of the measure submitted, IV, 34.

the reading of the papers, IV, 33.

required to be in writing, when, IV, 13.

seconding of a, IV, 15.

by more than one member, when, IV, 15.

to adhere, IV, 37.

to adjourn, IV, 27, 28.

adjournment equivalent to dissolution, when, IV, 28.

effect of adjournment on pending business, IV, 28.

not amendable or debatable, IV, 28.

to amend, IV, 23, 26.

defined, IV, 23, 24.

amendment to an amendment, IV, 25.

by striking out, IV, 25, 26.

limitations on, IV, 26.

never out of order, IV, 26.

to commit, to refer, or to recommit to a committee, IV, 19, 20, 23.

debatable, IV, 23.

may be amended, IV, 23.

with instructions, IV, 23.

to fix time of adjournment, IV, 28, 29.

to insist and ask for a committee of conference, IV, 37.

to lay on the table, IV, 19-21.

not amendable or debatable, IV, 20.

Motions, procedure on motion, motion, to lay on the table—*Continued*
 theoretically suspends consideration of the question, IV, 20.
 when defeated the original question proceeds, IV, 21.

to postpone,
 indefinitely, IV, 22.
 to a certain time, IV, 22, 23.
 to recede and concur, IV, 37.
 to reconsider, IV, 35, 36, 38.
 applicable, when, IV, 35.
 in order, when, IV, 36.
 when allowed reopens the whole question, IV, 35.
 who may make motion, IV, 36.
 to strike out, IV, 25, 26.
 to suspend rules, IV, 33.
 to take recess, IV, 29.
 not amendable or debatable, IV, 29.

privilege, questions of, how raised, IV, 29, 30.
 privileged motions, IV, 27-30.

 classes of, IV, 27.
 precedence of, over the main question, IV, 27-30.
 rejection of motion, IV, 16, 17.
 subsidiary motions, IV, 19-26.

 defined, IV, 19.
 classes of, IV, 19.
 precedence among, IV, 19.
 precedence of, over the main question, IV, 19-26.
 voting on motion, IV, 16-18.
 withdrawal of motion, IV, 16, 33.
 leave of assembly necessary, IV, 33.

Multiplicity of Suits,

ground for equity jurisdiction, I, 49.
 in strike cases, I, 61.
 jurisdiction of equity to avoid, I, 82-88.
 numerous plaintiffs, I, 85-87.

Municipal Corporations,

attachment of property of, not permitted, II, 5.
 bonds of,
 illegal cancellation of, in equity, I, 84.
 unauthorized by law, injunction against, I, 62.
 garnishment of property of, under statute, II, 46.
 officers of, injunction against, I, 62.
 ordinances of, illegal, injunction against, I, 62.
Mutual Benefit Society, gift to, in trust, a private trust, I, 125.

Naked Trusts. See **Passive Trusts.**

Naturalization,

definition and nature of, V, 11-13.

Naturalization—Continued

Bureau of Immigration and Naturalization in charge of all matters pertaining to, V, 12, 13.

by relationship, without legal proceedings, V, 33-38.

of alien woman married to American, V, 33, 34.

of American woman married to foreigner, V, 35.

of illegitimate and adopted children, V, 37, 38.

of minor children by naturalization of parent, V, 35-37.

residence, nature of citizenship and termination, V, 34, 35.

collective, V, 6-10.

defined, V, 6.

by admission of new states, V, 9, 10.

by conquest, V, 6, 7.

by special act of Congress, V, 8, 9.

by treaty, V, 7, 8.

courts authorized, V, 13.

declaration of intention, V, 15-18.

exceptions, V, 17, 18.

form, II, 18; V, 16, 17.

rights acquired, V, 17, 18, 19.

expatriation defined and explained, V, 1-5.

federal laws, according to, V, 11-19.

fraudulent, V, 31, 32.

methods of, V, 211, 214.

military service, special provisions for, V, 215, 216.

of aliens,

requirements, V, 149.

who do not speak English, V, 25.

who have served in the army or navy, V, 17, 18.

of married woman married to citizen of the United States, V, 33, 34.

of minor children, by naturalization of parent, V, 35, 36.

procedure in court, V, 20-32.

affidavit of witnesses, V, 23, 24.

duties of clerk, V, 28, 29.

fees, V, 29.

filing of petition, V, 24, 25.

form of certificate, V, 29-31.

form of petition, V, 21-23.

hearing, V, 25-28.

petition, V, 20, 21.

status of children whose mother becomes naturalized by marriage,
V, 36, 37.

to whom denied, V, 14, 15.

who may be naturalized, V, 13-15.

Non Compos Mentis. See Idiots; Insane Persons.

Non-Resident,

Attachment of property of non-resident debtor, II, 6, 7. See also
Attachment; Debtor.

Service by publication on, II, 27.

Judgments against, III, 17, 21.

Agent of, III, 20, 21.

Exceptions to rule, III, 19-21.

in England, III, 17, 18.

rendered,

in personam, effect of, III, 18.

in rem, III, 17.

views of the United States Supreme Court on, III, 18, 19.

Notice,

Refined, I, 189.

Actual, I, 189-192.

Constructive, I, 192-198.

by lis pendens, I, 194, 195.

by possession, I, 192-194.

by recording, I, 196-200.

by reference in the chain of title, I, 195, 196.

to agent is notice to principal, I, 200, 201.

Purchaser with, from a bona fide purchaser, I, 203, 204.

Disance,

Action for, bills of peace, I, 82, 83.

Decree,

as to balancing of injuries, I, 53-55.

in equity includes damages for past injury, I, 55.

Equitable, I, 51, 52.

Injunction suit to restrain,

by attorney general, I, 56.

defense of laches does not apply to, I, 219.

laches, form of decree, I, 55.

preliminary, I, 52, 53.

what are enjoined, I, 51-56.

Jurisdiction of equity to whole controversy, I, 225.

Trial at law, I, 52.

Officers, political acts of, will not be enjoined, I, 62.

Options to Purchase Land, I, 25, 26.

Parent and Child, fiduciary relation of, I, 173, 174.

Parliamentary Law,

Assemblies, kinds of, IV, 2, 3. See also Assemblies.

Classification of, IV, 1.

Clerk, IV, 3, 8.

Committees, IV, 40-42.

Chairman of, IV, 40.

Parliamentary Law, committees—Continued

- committee of the whole, IV, 41, 42.
 - debate cannot be limited, IV, 41.
 - purpose of, IV, 41.
 - quorum of, IV, 41.
 - report of action of the committee, IV, 42.
- membership committee, IV, 40.
- report of, IV, 40, 41.
 - majority report, IV, 40.
 - minority report, IV, 40.
 - reception of, IV, 40.
 - treatment of the report, IV, 40, 41.
- common parliamentary law, defined and explained, IV, 1.
- determinations, how arrived at, IV, 7, 8.
 - majority principle, IV, 7.
- introduction, IV, 1-10.
- Jefferson's manual on, IV, 1.
- journal, IV, 8, 9.
 - recording of proceedings in, IV, 8, 9.
- members, IV, 2, 3, 9, 10, 38, 39.
 - disorderly conduct of, expulsion for, IV, 9, 10.
 - general rule that members shall not speak more than once, IV, 39.
 - remarks of, must always be pertinent to subject under discussion, IV, 39.
 - rights and duties of, IV, 9.
 - should refrain from referring to each other by name, IV, 39.
 - when speaking should always address presiding officer, IV, 38, 39.
- who have obtained the "floor,"
 - cannot be interrupted except by,
 - a question of privilege, IV, 38.
 - call to order, IV, 38.
 - motion to proceed to the order of the day, IV, 38.
 - motion to reconsider, IV, 38.
 - may yield it, when, IV, 39.
- minutes, the, IV, 8, 9.
- motions, IV, 13, 15-38.
 - adoption of, IV, 16, 17.
 - "Are you ready for the question?" IV, 16.
 - debate upon, IV, 15.
 - for the orders of the day, IV, 30.
 - for the previous question, IV, 19, 21, 22.
 - as used,
 - in England, IV, 21.
 - in the United States, IV, 21.
 - at common law, IV, 22.

- Parliamentary Law, motions, for the previous question—*Continued*
 - debatable in England, IV, 22.
 - not debatable in United States, IV, 22.
- how put, IV, 16, 17.
- incidental motions, IV, 31-34.
 - defined, IV, 31.
 - are in order at almost any stage of the consideration, IV, 34.
 - classes of, IV, 31.
 - not amendable or debatable, IV, 34.
 - precedence among, IV, 34.
- making of, IV, 13, 14.
- modifying of, IV, 15.
- on disagreeing action, IV, 36, 37.
- privilege, question of, how raised, IV, 29, 30.
- privileged motions, IV, 27-30.
 - classes of, IV, 27.
 - precedence of, over main question, IV, 27-30.
- rejection of, IV, 16, 17.
- relating to,
 - the division of the question submitted, IV, 24.
 - the filling in of blanks of a measure submitted, IV, 24.
 - the method of consideration of measure submitted, IV, 34.
 - the reading of papers, IV, 33.
- required to be in writing, when, IV, 13.
- rules relating to, enumerated, IV, 38, 39.
- seconding of, IV, 15.
 - required to be seconded by more than one member, when, IV, 15.
- special motions, IV, 35-37.
- subsidiary motions, IV, 19-26.
 - defined, IV, 19.
 - classes of, IV, 19.
 - precedence among, IV, 19.
 - precedence of, over main question, IV, 19-26.
- to adhere, IV, 37.
- to adjourn, IV, 27, 28.
 - adjournment equivalent to dissolution, when, IV, 28.
 - cannot be amended or debated, when, IV, 28.
 - effect of adjournment on pending business, IV, 28.
 - when in order, IV, 27.
- to amend, IV, 23-26.
 - defined, IV, 23, 24.
 - amendment to an amendment, IV, 25.
 - by striking out, IV, 25, 26.
 - limitations on, IV, 26.
 - never out of order, IV, 26.

Parliamentary Law, motions—Continued

- to commit, refer or recommit to a committee, IV, 19, 20, 23.
 - debatable, IV, 23.
 - may be amended, IV, 23.
 - with instructions, IV, 23.
- to fix the time of adjournment, IV, 28, 29.
- to insist and ask for a committee of conference, IV, 37.
- to lay on the table, IV, 19-21.
 - not amendable, or debatable, IV, 20.
 - theoretically suspend consideration of the question, IV, 20.
 - when defeated, original question proceeds, IV, 21.
- to postpone,
 - indefinitely, IV, 22.
 - cannot be amended, IV, 22.
 - usually not debatable, IV, 22.
 - to a certain time, IV, 22, 23.
 - debatable on own merits, IV, 23.
 - may be amended as to date, IV, 23.
 - object of the motion, IV, 22, 23.
- to recede and concur, IV, 37.
- to reconsider, IV, 35, 36, 38.
 - applicable, when, IV, 35.
 - in order, when, IV, 36.
 - when allowed reopen the whole question, IV, 35.
 - who may make motion, IV, 36.
- to strike out, IV, 25, 26.
- to suspend rules, IV, 33.
- to take recess, IV, 29.
 - not amendable or debatable, IV, 29.
- voting on, IV, 16-18. See also "voting," *post*.
- withdrawal of, IV, 16, 33.
 - leave of the assembly necessary, IV, 33.
- order of business, IV, 5, 7, 11-18.
 - business,
 - how begun, IV, 11, 12.
 - "in the possession of the house," when, IV, 15, 16.
 - introduction of business, IV, 11-18.
 - by members, IV, 11, 12.
 - by presiding officer, IV, 12.
 - prescribed by the assembly, to be followed, IV, 7.
 - special rules of procedure, adoption of IV, 5.
- order of the day,
 - motion for, IV, 30.
 - "Shall the order of the day be taken up?" IV, 30.
- organization of assemblies, IV, 2-5.
 - kinds of assemblies, IV, 2, 3. See also Assemblies.

- Parliamentary Law**, organization of assemblies—*Continued*
- meeting place, control of, IV, 5.
 - members, IV, 2, 3.
 - officers, IV, 3-5.
 - choosing of, IV, 4-5.
 - of state legislatures, IV, 4.
 - of United States Senate, IV, 4.
 - presiding officer, IV, 3.
 - recording officer, IV, 3.
 - Origin of, IV, 1.
 - Petitions,
 - defined, IV, 14.
 - introducing, IV, 14.
 - reading of, by clerk, IV, 14.
 - Point of order, IV, 14, 31-33, 38.
 - decisions of the chair on, appeal from, IV, 32, 33.
 - illustration of, IV, 32.
 - question of order, IV, 31, 32.
 - defined, IV, 32.
 - rulings on, appeals from, IV, 32, 33.
 - takes precedence of an objection to consideration, IV, 32
 - Presiding officer, IV, 3, 8.
 - conduct and rights of, IV, 8.
 - election of, IV, 3.
 - Questions,
 - adoption of, IV, 16, 17.
 - “Are you ready for the question?” IV, 16.
 - how put, IV, 16, 17.
 - “main question,” defined, IV, 16.
 - of consideration, IV, 31.
 - defined, IV, 31.
 - applied to the main question only, IV, 31.
 - obstacles to, IV, 31.
 - of order, IV, 31, 32.
 - defined, IV, 32.
 - example of, IV, 32.
 - rulings on, appeals from, IV, 32, 33.
 - of privilege, IV, 29-30, 38.
 - addressed to presiding officer, IV, 29.
 - affecting,
 - assembly collectively, IV, 29.
 - members individually, IV, 29.
 - examples of, IV, 29.
 - how raised, IV, 29, 30.
 - Quorum, IV, 5-7.
 - defined, IV, 5.
 - adjournment for lack of, IV, 6, 7.

Parliamentary Law, quorum—Continued

- fixed by law, when, IV, 6.
- presumption of a, IV, 6.
- the majority, when, IV, 6.
- when not required, IV, 5.
- reading of papers, motions relating to, IV, 33.
- recording officer, IV, 3, 8.
- seconding of motions, IV, 15.
- suspension of rules, IV, 33.
 - motions to suspend rules take precedence of main question, IV, 33.
- the "floor," IV, 12-14.
 - defined, IV, 12, 13.
 - how obtained, IV, 12, 13.
- members,
 - having, cannot be interrupted except by,
 - a question of privilege, IV, 38.
 - call to order, IV, 38.
 - motion to proceed to the order of the day, IV, 38.
 - motion to reconsider, IV, 38.
 - may demand, when, IV, 14.
 - recognition of, IV, 12, 13.
- voting,
 - on motions, IV, 16-18.
 - by,
 - acclamation, IV, 16.
 - "aye" and "nay," IV, 16, 17.
 - roll call, IV, 17, 18.
 - standing vote, IV, 17.
 - counting of votes, IV, 17.
 - presiding officer votes, when, IV, 18.
 - questions, how put, IV, 16, 17.

Partition,

- of land,
 - accounting in, I, 99.
 - equitable remedies, I, 91-94.
 - owelty of, I, 93.
 - sale, I, 93, 94.
 - where inconvenient, owelty, I, 92, 93.
- of personal property, in equity, I, 94.

Partners,

- fiduciary relation of, I, 133, 174.
- when relationship of partners creates a constructive trust, I, 128.

Partnership,

- creditors of, accounting, I, 99.
- dissolution of, appointment of receiver, I, 107.
- garnishment of partners, II, 55.

Partnership—Continued

insolvency, accounting in equity, I, 99.
when relation creates a constructive trust in favor of partners, I, 128.

Passive Trusts, defined, I, 120, 121.

Patents,

infringement of,
 accounting of, I, 99.
 complete relief, I, 57, 58.
 defenses of laches does not apply, I, 219.
 injunction against, I, 56, 57.

Penalties,

and forfeitures, relief in equity, I, 180.
and liquidated damages, relief in equity, I, 180-182.

Petitions,

introduction of, in deliberative assemblies, IV, 14.
 reading of petition by the clerk, IV, 14.

Philippine Islands,

by treaty with Spain of 1898, status of natives to be determined by Congress, V, 7.

Physician and Surgeon, fiduciary relation of physician and patient, I, 174.

Point of Order,

decisions of the chair on, appeal from, IV, 32, 33.
question of order, IV, 31, 32.
rulings on, appeals from, IV, 32, 33.
takes precedence of an objection to consideration, IV, 32.

Poor, trusts to provide for the relief of the, I, 124.

Porto Rico,

by treaty with Spain of 1898, status of natives to be determined by Congress, V, 7.

Possession, priority of first assignee who reduces to, I, 210.

Practice and Procedure,

in equity joinder of parties, I, 9.
in Great Britain in early courts by "writs," I, 3.

Principal and Agent,

accounting between, I, 100.
fiduciary relation, I, 133, 173, 174.
non-disclosure by confidential agent, in equity, I, 168.
notice to agent is notice to principal, I, 200, 201.
when relation creates a constructive trust in favor of principal, I, 128.

Principal and Surety. See also Surety.

conveyance of mortgaged premises, when creating relation of, I, 149.

jurisdiction of equity once existing, is not lost by enlargement of legal jurisdiction, I, 226, 227.

Priorities,

- fraud, effect of, on, I, 208-210.
- inferior equities, I, 208-210.
- in receivership, I, 112, 113.
- judgment liens, I, 207, 208.
- notice, effect of, I, 209, 210.
- of equitable liens in England, I, 209.
- of first assignee who reduces to possession, I, 210.
- on assignment of things in action or of a trust fund, I, 210, 211.
- purchase money mortgages, I, 207, 208.
- superior equities, I, 207, 208.

Prize Courts,

- judgments of,
 - are conclusive evidence of the facts upon which they proceed, III, 55.

Probate Courts, administration of estates of decedents, I, 139, 140.

Procedure, whether jurisdictional, III, 27-31. See also Practice and Procedure.

Process,

- service of, II, 27-31; III, 16, 17.
 - at last place of residence, III, 17.
 - by notice in the market place in England, III, 17.
 - constructive, II, 28.
 - control of court of its officers in the, III, 61.
 - in actions for writ of attachment, II, 27-31.
 - actual service, II, 27.
 - at domicile of defendant considered as personal service in some states, II, 27.
 - by publication, II, 27-31.
 - as substitute for the summons, II, 30.
 - defective proofs of, II, 29.
 - defective service of, II, 30.
 - does not give the court jurisdiction, II, 29.
 - failure of record to show, judgment may be reversed for error, II, 29.
 - how effected, II, 28.
 - mailing of copy of, to defendant's last known address, II, 28.
 - on absconding debtor, II, 27.
 - on non-resident debtor, II, 27.
 - on one who stands in defiance of an officer, II, 28.
 - preserving proof of service, II, 28, 29.
 - statutory requirements, II, 28.
 - unknown at common law, II, 28.
- in garnishment proceedings, II, 59-61.
 - by person authorized to serve process, II, 59.
 - endorsement of manner of service by officer, II, 61.
 - on non-resident temporarily within state, II, 60.

Process, service of, in garnishment proceedings—*Continued*.
 service by publication not sufficient, II, 60.
 service must be personal, II, 59.
 on corporations, III, 21.
 on non-residents, II, 27; III, 17-21.
 exceptions to the rule, III, 19-21.
 personal, II, 27.
 to secure jurisdiction over the person, III, 16, 17.

Property,

 equitable property rights and interests, I, 8, 9, 117-163.
 ownership of, legal and equitable, I, 118.
 quasi-property rights in equity, I, 8.

Public Nuisance. See Nuisance.

Public Officers, funds held by, not subject to garnishment, II, 50.

Purposes,

 for which trust may be created, I, 121, 122.
 charitable trusts, I, 123-125.
 education, I, 125.
 eleemosynary, I, 125.
 religion, I, 124, 125.

Quasi-Property Rights, in equity, I, 8.

Quorum,

 defined, IV, 5.
 adjournment for lack of, IV, 6, 7.
 fixed by law, when, IV, 6.
 of a committee of the whole, IV, 41.
 presumption of a, when, IV, 6.
 the majority, when, IV, 6.
 when not required, IV, 5.

Railroads,

 eminent domain, injunction against exercise of, I, 63, 64.
 receivers of, I, 109.
 necessary operating expenses, preferences, I, 114.
 priority of claims of material men, wages of employees, I, 113.
 strike against, punished as contempt, I, III.
 rolling stock, mortgage of future acquired, in equity, I, 162.

Receivers,

 defined, I, 106.
 appointment of,
 one not personally interested, I, 107.
 when and how, I, 106-108.
 as officers of the court, I, 110.
 certificates, issuing of, I, 112.
 contempt of court of order to deliver goods to, I, 110.
 corporation, I, 108-110.

Receivers—Continued

- duty to obey orders of court, I, 112.
- expenses, priority, I, 112, 113.
- funds held by not subject to garnishment, II, 50.
- funds of, claims against, I, 112, 114.
- growth in equity, I, 7.
- management of property, I, 112.
- possession of the, I, 110, 111.
- suits by and against, I, 111, 112.

Records,

- of an action,
 - defined, III, 31.
 - conclusiveness of the, III, 33, 35.
 - entry of the, III, 31, 32.
 - false entry on, III, 34.
 - includes what, III, 31.
 - incorporation of testimony into the, III, 31.
 - may not be,
 - added to, III, 34.
 - contradicted, III, 34.
 - mistakes in,
 - may be corrected when discovered, III, 32, 33.
 - power of court to correct, III, 32, 33.

Reformation,

- of instruments,
 - for mistake,
 - bona fide purchaser, I, 206.
 - in gifts, I, 76, 77.
 - mutual, I, 70.
 - of law in gifts, I, 81.
 - of one party known to the other, I, 71, 72.
 - when there can be no, I, 72, 73.
 - where instrument does not express the contract, I, 77-79.

Remedies,

- equitable, I, 8, 9, 12-116.
 - injunctions in aid of, I, 64, 65.
 - "in the discretion of the court," I, 6.
- provisional, auxiliary jurisdiction, I, 101-116.
- suits for pecuniary relief, I, 95-100.
 - accounting, I, 98-100.
 - contribution, I, 98.
 - creditors' suits, I, 95-97.
 - exoneration, I, 97, 98.

Replevin,

- at law, I, 8.
- concurrent jurisdiction of law and equity, I, 8.
- of chattels, legal remedy, I, 8.

- representations, false, elements of, I, 166.
- rescission,
 - of contract,
 - for mutual mistake, in equity, I, 73, 74.
 - of instruments,
 - for mutual mistake,
 - as to value, I, 74, 75.
 - when, I, 73, 74.
 - for unilateral mistake, I, 75, 76.
- resulting Trust, creation of, I, 126-128.
- sale,
 - of after-acquired personal property, I, 162, 163.
 - of land. See Vendor and Purchaser
- satisfaction,
 - doctrine of, I, 186-188.
 - legacies and advancements or portions, doctrine of, I, 186-188.
- schools, inspector of, power of, III, 9.
- scire Facias, Writ of, issuance of, II, 66, 67.
- seal, not as important in equity as in law, I, 222. See also Contracts.
- Senate, Vice-President of the United States the presiding officer of, IV, 4.
- Set-Off and Counterclaim,
 - failure to set up, effect of, III, 40.
 - judgment bars, when, III, 40.
 - to be set up, when, III, 40.
- sheriff,
 - is bound to obey orders of judgment creditor in the execution of judgment, III, 62.
 - is under the control of the court, III, 61.
 - right of, to bond of indemnity from judgment creditor in execution of judgment, III, 64, 65.
 - staying execution of a writ on order of judge, no liability of, for, III, 62.
- slaves, contract for sale of, specific performance of, I, 15.
- specific Performance,
 - defined, I, 12.
 - cestui que trust may compel, by trustee, I, 122.
- of contracts, I, 12-43.
 - against third persons, I, 35-38.
 - building contracts, I, 15-17.
 - chattel contracts, exceptional cases, I, 14, 15.
 - concealment of facts, by vendee, I, 20, 21.
 - consideration, inadequacy of, no defense, I, 169.
 - consideration, necessary, I, 19, 20.
 - death of parties, I, 38-40.

Specific Performance, of contracts—*Continued*

- defense, bona fide purchaser, I, 206.
- discretionary power of equity, I, 19.
- doubtful title, I, 26, 27.
- equitable incidents, I, 19-27.
- "equity follows the law," I, 214.
- failure to disclose, defense to, I, 168.
- for continuous acts, I, 16.
- for personal services, I, 15-17.
- hardship and unfairness, I, 22-24.
- laches, defense of, I, 219.
- misrepresentation, I, 20.
- mistake,
 - "mutual," I, 21.
 - "unilateral," I, 21.
- mutuality of equitable remedies, I, 24-26.
- negative injunction, I, 17-19.
- not to engage in business or profession, I, 18.
- partial, with compensation, I, 34, 35.
- part performance, act of, I, 31-34.
 - doctrine of the Statute of Frauds, I, 29, 30.
 - improvements, I, 31-33.
 - payment, I, 31.
 - payment in services, I, 33, 34.
 - possession, I, 31-33.
- sale of chattel, I, 13.
- sale of land, I, 13, 14.
 - doubtful title, I, 26, 27.
- secured by, misrepresentation, not subject to, I, 20.
- summing up, I, 42, 43.
- time, how made of the essence, I, 28, 29.
- time not generally of the essence, I, 27, 28.
- under seal, I, 19.
- unfairness, hardship and, I, 20-24.
- vendor's lien, I, 40, 41.

Spendthrift Trust, I, 123.**States**,

- admission of new, naturalization by, V, 9, 10.
- house of representatives of,
 - presided over by a speaker, IV, 4.
- officers of, injunction against, I, 62.
- senates of,
 - lieutenant-governor, the presiding officer of, IV, 4.
 - organization of, IV, 4.

Statute of Frauds,

necessity of writing to create an express trust, I, 125, 126.

part performance of oral contracts, within the, in equity, I, 29-35.

shall not be an instrument for committing fraud, I, 29, 148.

Statute of Limitations, generally does not apply to suits in equity, I, 218.

Statute of Uses,

effect of, I, 119 120.

enacted in 1535, I, 120.

to remedy the evils of the system of uses and trusts, I, 120.

Stock, contract for sale of, specific performance of, I, 14, 15.

Strikes,

against railroad under receivership, as contempt, I, 111.

injunction against, I, 60, 61.

Subrogation, of mortgage, I, 152-154.

Succession,

descent and, *cestuis que trustent*, I, 123.

rules of, "equity follows the law," I, 123, 214.

Surety. See also Principal and Surety.

contribution between co-sureties, I, 98.

exoneration in equity, I, 97, 98.

Taxes,

injunction against illegal, I, 63.

injunction suit by taxpayer to test validity of tax, I, 86.

of property in hands of receiver, I, 111.

Tenant in Common, attachment of property by, II, 4.

Territories,

ceded to United States, inhabitants became by treaty citizens, V,
9, 10.

Timber, cutting of, as waste, injunction against, I, 44.

Title to Land,

defined, I, 88.

cloud on, I, 69, 88.

constructive notice by recording, I, 196-198.

equitable estoppel, application of, I, 179, 180.

instrument invalid on its face, no cloud, I, 89, 90.

plaintiff's possession, I, 88, 89.

statutory suit to quiet title, I, 91.

Torts, injunctions against, I, 44.

Trademarks, unfair competition, injunction against, I, 59, 60.

Treaties, recognizing expatriation, V, 2, 3.

Trespass,

actions for, bills of peace, I, 82-84.

injunction against,

"equity follows the law," I, 214.

grounds for, I, 47-51.

Trespass, injunction against—Continued

- mandatory, I, 50, 51.
- preliminary, I, 49, 50.
- title in dispute, I, 49-51.
- to personal property, I, 51.

Trustee,

- actions against,
 - appointment of receiver, I, 107.
 - by beneficiary, I, 99.
- appointment of, I, 133.
- attachment of property held by, not allowed, II, 5.
- breach of trust by, injunction restraining, I, 65.
- compensation of, for services, I, 132, 133.
 - English rule, trustee not entitled to, I, 132.
 - fixed by statute, I, 132.
- conveyances by, I, 129.
- creditor's bill against, I, 122.
- custody of the trust property, duty of, I, 131, 132.
- debts, alienation and liability for, I, 122, 123.
- duties of, I, 130-132.
 - to account to beneficiary, I, 65, 99.
 - to act in good faith, I, 132.
 - to keep records of administration of trust, I, 132.
- execution against, I, 122.
- following of trust property or property substituted, misapplied by, I, 129.
- funds held by, not subject to garnishment, II, 49, 50.
- may bring suit to obtain interpretation of trust, I, 130.
- not an insurer, I, 131.
- powers of, express, of investment, I, 131.
- process, II, 44.
- quasi-trustees, I, 133, 134.
- reimbursement of, for expenditures, I, 132.
- removal of, I, 133.
- rights of,
 - to compensation for services, I, 132, 133.
 - to reimbursement for expenditures, I, 132.

Trusts,

- classes of, I, 120-122.
- following the trust property, I, 129.
 - conveyance by trustee in breach of trust, I, 129.
- fraud, non-disclosure by fiduciaries, I, 168, 169.
- in early English equity procedure, I, 4.
- parties to, I, 122.
- private, I, 123, 124.
- purposes for which, may be created, I, 121, 122. See also Purposes for which trust may be created.

Due Influence, as ground for equitable relief, I, 172.

See also Trusts.

Defined, I, 199.

an early English equity procedure, I, 4.

invention of, I, 119.

Vendor and Purchaser,

bona fide purchaser,

freed from all equities, I, 203, 204.

how question may arise, I, 205, 206.

is a quitclaim grantee a, I, 204.

payment, I, 202, 203.

purchaser with notice from a, I, 203, 204.

valuable consideration, I, 201, 202.

with actual notice, I, 189-192.

Contract of,

concealment of facts, specific performance, I, 20, 21.

consideration, inadequacy of, as evidence of fraud, I, 169, 170.

death of parties, I, 38-40.

oral land, enforced in equity, when, I, 29, 30.

payment, specific performance, I, 30, 31.

possession, improvements, services, specific performance, I, 31-33.

reformation and rescission, I, 73, 74.

specific performance of land, I, 13, 14. **See also** Specific Performance.

Equities,

grantor's reserved, I, 160.

vendor's, I, 40, 41, 158-160.

Notice, constructive, I, 192-198.

by *lis pendens*, I, 194, 195.

by possession, I, 192-194.

by recording, I, 196-200.

by reference in the chain of title, I, 195, 196.

to agent is notice to principal, I, 200, 201.

Ownership in equity, I, 41, 42.

partial specific performance with compensation, I, 34, 35.

part performance, Statute of Frauds, I, 29-34, 221.

purchase price of land, methods of securing, I, 160, 161.

specific performance against third persons, I, 35.

bona fide purchaser, I, 36.

volunteer, I, 36.

Title,

chain of, constructive notice by reference in, I, 195, 196.

doubtful, specific performance, I, 26, 27.

waste, care as to, required of, I, 41, 42.

Wages, assignment of future, in equity, I, 163.

Warehouses, warehouseman, bill of interpleader will lie against, when
I, 105, 106.

Waste,

accounting for past, I, 46.

equitable,

defined, I, 46, 47, 221.

injunction against, I, 46.

injunction against, I, 44-46.

future waste, I, 45.

jurisdiction of equity once taken extends to whole controversy, I, 223.

vendor's care required with reference to property under his control
I, 41, 42.

Water,

companies, pipes in highways, injunction against, I, 48.

partition in the use of, I, 92, 93.

pollution of, injunction against, I, 52.

Wills,

decree allowing instrument as will without personal service on heir
of testator, when, III, 23.

equitable conversion under, I, 138, 139.

interpretation of, doctrine of satisfaction, I, 186-188.

legacies and advancements or portions, doctrine of satisfaction, I, 186-
188.

Statute of. See Statute of Wills.

Witnesses,

auxiliary jurisdiction of equity for examination of, I, 115, 116.

taking of testimony de bene esse in equity, I, 116.

Women, estates of married. See Married Women.

Writ of Attachment, II, 1-43. See also Attachment.

Writs, procedure of early English courts by, I, 3.

